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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HEIDI MUTH,

Plaintiff and Respondent,

v.

ORCO BLOCK COMPANY, INC.,

Defendant and Appellant.

G045160

(Super. Ct. No. 30-2009-00125653)

O P I N I O N

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

Law Office of Thomas W. Sardoni, Thomas W. Sardoni and Daniel L. Schnebly for Defendant and Appellant.

Mollis & Mollis, Inc., and Charles A. Mollis for Plaintiff and Respondent.

* * *

This is a breach of contract action relating to the termination of Lynn G. Muth's¹ employment in a business enterprise controlled by his family. Pursuant to one of several relevant agreements, the action was tried pursuant to the provisions of Code of Civil Procedure section 638. Muth prevailed before the reference judge, and judgment for \$388,092.78 was entered by the trial court. Defendant Orco Block Company, Inc. (Orco) argues a number of grounds for reversal, including erroneous factual and legal conclusions, excessive damages, and the denial of two motions in limine. We conclude there was no reversible error and affirm the judgment.

I

FACTS

Orco, which was founded by Peter G. Muth,² is a manufacturer and reseller of concrete blocks, and has been owned and operated by members of the Muth family for several decades. Peter served as president and chief executive officer until he was succeeded by his son, and Lynn's brother, Richard (Rick). In 1989, Lynn began working for Orco and served in a number of different capacities.

The parties signed several agreements relevant to this case. The first is an employment agreement (the EA) dated August 1, 1996, which stated Lynn was to be employed for an initial term of 13 years. The EA's recitals stated that Lynn was "an individual possessing unique skills, knowledge and experience of value to the Company."

Under the EA, early termination of Lynn's employment was limited to death, disability, voluntary resignation, and "good and valid cause." The EA stated: "For purposes of this Agreement, good and valid cause shall mean (i) the failure or inability of Employee to cure, within ten (10) days of receipt of written notice by the Board,

¹ Lynn Muth died before proceedings were concluded in the trial court, and he is now represented by his wife, Heidi Muth, as successor in interest.

² Because a number of members of the Muth family are involved in this case, we refer to them by their first names for the ease of the reader. No disrespect is intended.

Employee's refusal or failure to substantially perform the primary duties of his employment hereunder" This clause also included provisions for termination of the agreement based on the abuse of drugs or alcohol, as well as fraud, criminal acts, and moral turpitude. In the event Lynn's employment was terminated without cause, the EA entitled Lynn to receive four years of salary and other benefits.

The second relevant agreement is the Muth Family Agreement (the MFA), which was entered into by Orco, Lynn and Rick, as well as other related parties, in August 2007. Section 6 of the MFA stated: "The parties agree to cause Orco to extend the term of Lynn's current Employment Contract through the later to occur of (a) Lynn's attaining age sixty (60) and (b) Mary's death, provided that in no case shall such contract extend past the date of Lynn's attaining age sixty-five (65)." Mary is Lynn and Rick's mother, who, as of July 2009, was alive and living in a care facility. Lynn was 59 in August 2007 and would have turned 65 on April 5, 2013. In April 2009, this provision was reaffirmed by an amendment to the MFA (the AMFA).³

According to Lynn, in February 2009 Orco stopped paying his salary, an action Orco characterized as a "suspension." In July, Lynn filed the instant action, alleging breach of the MFA. He also requested an accounting and specific performance. In due course, pursuant to the MFA, Judge Robert E. Thomas (Ret.) was selected as reference judge.

During the trial before Judge Thomas, evidence was produced regarding Lynn's competence as an employee. A number of Orco employees testified, in sum, that Lynn was a good person but unable to perform his job duties or follow directions. He also lacked organizational skills and was unable to comply with the normal requirements of an employer. Lynn introduced evidence that Rick had systematically eliminated

³ The AMFA was primarily intended to "resolve . . . disputes and controversies . . . regarding who Orco stock may be transferred to." Other than terms relating to stock, the AMFA specifically reaffirmed all other sections of the MFA.

Lynn's managerial responsibilities at Orco based on their deteriorating personal relationship. By the last three or four years of his employment, Rick had eliminated Lynn's job responsibilities except for signing checks one day per week. He was also assigned to assist his mother at her home.

During this period, in 2007, Orco agreed to the MFA, which had the potential effect of extending Lynn's term of employment. This was later reaffirmed by the AMFA, despite the fact that by the time it was signed in April 2009, Orco had already stopped paying Lynn's salary.

VerLynn Jensen, an attorney, testified regarding the circumstances under which the parties entered into the MFA. He stated the MFA was the result of negotiations between Lynn and Orco, and specifically, it was related to an overvaluation of the 25 percent interest Rick had in the Muth Development Company. This overvaluation was \$1,486,000 in Rick's favor. Lynn forgave the overvaluation for the agreement to continue his employment under the MFA. Andrew M. Katzenstein, the attorney for Rick who negotiated the MFA, testified that it was not intended to provide Lynn with lifetime employment.

At the conclusion of the reference trial, Judge Thomas concluded that Orco had violated the termination for cause provision of the EA by failing to give Lynn 10 days' notice and an opportunity to cure. In addition, Judge Thomas concluded the remaining termination provisions were not at issue based on the evidence presented, including Rick's allegations of drug or alcohol abuse. The only evidence of fraud or other malfeasance was an allegedly falsified time card, which could not be produced at the reference trial.

As a result of the termination without cause, Judge Thomas concluded Lynn was entitled to the remedies under the termination without cause provision of the EA, including four years' salary and a waiting time penalty under the Labor Code. Including damages, attorney fees and costs, Judge Thomas awarded Lynn \$388,092.78.

Before the superior court, Judge James J. De Cesare ordered that Judge Thomas’s revised final judgment be entered as the judgment of the court. Orco now appeals.

II

DISCUSSION

A. *Material Breach of Contract*

Orco’s argument, in sum, is that Lynn was terminated (or “suspended”) for cause, and that any failure to comply with the language of the EA regarding a cure period and notice by the board was not a material breach of contract. Lynn argues the finding regarding material breach was consistent with the evidence, and he did not waive any provisions in the EA regarding notice and cure.

We begin our analysis with the standard of review. “‘A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’ [Citations.]” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, original italics.) Further, this court is bound by implied findings made by the trier of fact. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1182.)

“When findings of fact are challenged in a civil appeal, we are bound by the familiar principle that ‘the power of the appellate court 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. [Citation.] Substantial evidence is evidence of ponderable legal significance, reasonable, credible and of solid value. [Citation.]” (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100.) The testimony of a single witness may alone constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) We do not reweigh the credibility of witnesses or

resolve conflicts in the evidence. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 622.) With that said, however, any questions regarding the legal interpretation of a contract's provisions are reviewed independently by this court. (*New Haven Unified School Dist. v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473, 1483.)

“We begin our review with some basic principles of contract interpretation. We must interpret a contract so as to give effect to the mutual intent of the parties at the time the contract was formed. (Civ. Code, § 1636.) ‘The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.’ (Civ. Code, § 1638.) Courts must also endeavor to give effect to every part of a contract, ‘if reasonably practicable, each clause helping to interpret the other[s].’ (Civ. Code, § 1641.)” (*Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1060.)

Orco's argument on this point is in two parts. First, Orco argues that it had good cause to terminate (or permanently “suspend”) Lynn's employment. We assume, for the sake of argument, this is true. Had the reference judge decided that Orco had terminated Lynn for cause, there would certainly be substantial evidence in the record to support it.

The rub, however, lies in the second part of Orco's argument, which is that Orco was a “small, informally-run corporation with a deadlocked board” when Lynn was “suspended.” Thus, Orco argues, it should not be held to the requirement in the termination for cause provision of the EA requiring the board to give Lynn 10 days' notice, during which time Lynn would have had the opportunity to cure his failure to “perform the primary duties of his employment.” Orco argues there was substantial evidence at trial that Orco was a “small family board,” and at the time of Lynn's “suspension,” the board was deadlocked between Lynn and Rick, the only two members

with voting privileges.⁴ Thus, Orco argues, a board vote on the subject of Lynn's employment would have been futile.

In support of its argument, Orco cites two cases stating that closely held corporations may act on certain occasions without formal board or shareholder action. It begins with *Nelson v. Anderson* (1999) 72 Cal.App.4th 111 (*Nelson*), which involved an action between the only two shareholders of a corporation. The plaintiff, the minority shareholder, alleged the defendant and majority shareholder had breached her fiduciary duties to the corporation. (*Id.* at p. 122.) The appellate court ultimately reversed a jury verdict in favor of the plaintiff, agreeing with the defendant that the action should have been brought as a derivative action on behalf of the corporation. (*Id.* at p. 117.) Orco relies on a footnote, which states: "We observe, however, that [the plaintiff's] major complaint was that [the defendant] made decisions with which she disagreed, and did so without formal board or shareholder meetings. Lack of formality in a closely held corporation and dissension among shareholders are not unusual or necessarily evil occurrences" (*Id.* at p. 125, fn.7.)

Obviously, the facts of *Nelson* are entirely different from the relevant facts here. The dispute in *Nelson* involved two board members acting as such, while here, Lynn's role as an employee placed him outside the context of any role as a board member. Further, *Nelson* did not involve contractual language which obligated the board to act in a certain fashion, and that obligation was present regardless of Lynn's dual status as both employee and board member. In addition to the fact that the language in *Nelson* is dictum, its facts are so different that it is of no use to Orco here.

⁴ Orco also argues that Lynn testified at his deposition that he had never considered requesting board action, but that is irrelevant. The language of the EA puts the onus on the board, not on Lynn as an employee, to fulfill the terms of the termination for cause provision.

The only other case Orco cites on this point is *Biren v. Equality Emergency Medical Group, Inc.* (2002) 102 Cal.App.4th 125 (*Biren*). That case involved the invocation of the business judgment rule in a case involving an alleged breach of fiduciary duty. The court compared how large and small corporations conduct business: “Larger corporations often have formal board committees to recommend the approval of a variety of contracts. But small corporations like Equality conduct much of their official business informally. [Citations.] ‘[I]t is well known that corporations which include only a few shareholders do not often act with as much formality as larger companies. This is especially so where the members of the board personally conduct the business of the corporation.’ [Citation.] The practice of allowing officers to approve contracts is so prevalent in some close corporations, for example, that they bind the entity even though the officer should have obtained board approval. [Citation.]” (*Id.* at p. 137.)

Once again, this case has no relevance here. In *Biren*, the question was whether an action that could reasonably be seen as the exercise of business judgment constituted a breach of fiduciary duty. (*Biren, supra*, 102 Cal.App.4th at pp. 136-138.) In the instant case, the issue is whether a board can ignore mandatory language in a freely negotiated contract on the grounds that it is small and at times acts informally.

In addition to the fact that the cases Orco cites do not support its argument, neither does logic or common sense. It is one thing for a corporation to act informally with regard to how it chooses to, for example, make everyday decisions regarding the conduct of its business. It is another matter entirely for a corporation of any size to claim that it can ignore contractual language with a third party (and for purposes of the EA, Lynn is a third party), based on its size or usual manner of doing business. Indeed, the more it is examined, the more specious Orco’s argument reveals itself to be. If this contract involved a party who had no personal relationship with any member of Orco’s management, it would be absurd. It is no less so because of the familial relationships present here.

Orco's only other argument is that because the board was "deadlocked" between Rick and Lynn, a board vote would have been futile. Orco then goes on to explain exactly how that deadlock could have been broken, including "petitioning for court appointment of a provisional director under *Corporations Code* § 308; filing a derivative action to appoint a receiver; or even filing an action to dissolve the corporation under *Corporations Code* § 1800(b)(2)." Regardless of whether such steps would have been unreasonably burdensome, as Orco claims, they were certainly not *impossible*. The use of impossibility as an excuse for performance of a contractual term, as codified in Civil Code section 1441, is limited and rare, which is probably why Orco cites no cases on this point. Orco fails to provide any authority supporting its contention that complying literally with the terms of the EA was impossible.

Further, Orco ignores that a *vote* of the board was not a requirement. The language of the termination for cause provision stated: "For purposes of this Agreement, good and valid cause shall mean (i) the failure or inability to cure, within ten (10) days of receipt of written notice by the Board, Employee's refusal or failure to substantially perform the primary duties of his employment hereunder"

Nowhere does it say that a vote of the board is required — merely *notice* by the board. As dictated by logic and the general purpose of a cure clause, the key words here are not "Board" but "written notice," the point of which was to give Lynn the opportunity to address any issues Orco had with his performance. If Orco had given notice under the signature of its CEO, rather than its board, it would have been in a position to argue substantial compliance, and we may well have agreed with such an argument. It did not do so, instead ignoring the provision completely. Whether giving Lynn notice would have been a wasted exercise is not the point — the point is that he was entitled to it under the EA, which was a freely negotiated contract between represented parties. The failure to provide notice was therefore a breach. (See Rest.2d, Contracts, § 235 subd. (2): "When performance of a duty under a contract is due, any non-

performance is a breach.”) In sum, we find no error of law, and conclude that substantial evidence supports the reference judge’s conclusions with regard to Orco’s breach of contract.

B. Damages

In a one-page argument devoid of legal authority, Orco asserts that the reference judge’s award of damages was not reduced to take into account Lynn’s failings as an employee. Instead, upon the conclusion that Orco breached the contract, he was awarded the full amount due “under the most expansive interpretation” of the EA, plus attorney fees. Orco argues the damages awarded were “inequitable.”

We need not belabor this issue. The measure of damages in a breach of contract claim is the amount that will compensate for all damages proximately caused. (Civ. Code, § 3333.) The parties freely negotiated the proper measure of damages for dismissal without cause, which, as we have already noted, is what happened here due to Orco’s failure to follow the EA’s provisions to terminate for cause. We see no legal reason to second-guess the measure of damages the parties decided was appropriate. Orco does not argue the amounts awarded were improperly calculated based on the EA’s damages provisions, and therefore, we find no error.

C Motions in Limine

Finally, Orco argues the reference judge wrongly denied two motions in limine. Orco’s “burden is to demonstrate the court’s ‘discretion was so abused that it resulted in a manifest miscarriage of justice. [Citations.]’ [Citation.]” (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 456, disapproved on another ground in *People v. Freeman* (2010) 47 Cal.4th 993, 1006-1007, fn. 4.) Thus, even where evidence has been erroneously admitted, the judgment shall not be reversed unless the reviewing court

believes the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 353.)

Orco has failed to carry this burden with respect to two motions in limine it claims the reference judge erroneously denied. The first motion asked the reference judge to exclude all extrinsic evidence relating to the terms of the EA or the MFA based on the parol evidence rule. The second asked the judge, without legal argument, to limit the testimony of VerLyn Jensen to Section 6 of the MFA, which addressed the extension of Lynn's contract. Orco argued it would be prejudicial for him to testify to other matters, because he stated at his deposition his testimony would be limited to that clause. After the motions were denied, Jensen testified regarding the consideration for the MFA, specifically the overvaluation on other property.

Even if Orco could persuade us that denying these motions constituted an abuse of discretion, it offers nothing more than a conclusory sentence asserting prejudice. Given that we can find no argument anywhere in Orco's briefs or in the record below asserting the MFA was supported by insufficient consideration, the trial court's decision to hear this evidence was not even mildly prejudicial to Orco, much less a miscarriage of justice.

With respect to the argument that Jensen stated at his deposition that he only intended to testify as to the clause in the MFA relating to Lynn's employment. The consideration provided in exchange for this clause was a logically related subject. Further, there is nothing in the record suggesting that Orco found this testimony so shocking or damaging that it requested, for example, additional time to research the matter. Again, given that consideration for the MFA was never an issue in this case, there is no rational argument to be made that any error in hearing this evidence rose to the level of a miscarriage of justice. In sum, Orco has failed to establish reversible error.

III
DISPOSITION

The judgment is affirmed. Heidi is entitled to her costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.