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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LIEU PHAM et al.,

Cross-complainants and Appellants,

v.

TIEN LE et al.,

Cross-defendants and Respondents.

G045358

(Super. Ct. No. 07CC04588)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John C. Gastelum, Judge. Reversed and remanded.

Law Offices of Ashton R. Watkins and Ashton R. Watkins for Cross-complainants and Appellants.

The Amin Law Group, Ismail Amin, Tenny C. Rostomian-Amin, Rubina Andonian and Holly Townson for Cross-defendants and Respondents.

In our prior opinion, we held cross-defendants Tien Le (Mr. Le) and his former-wife, Dieu-Hoa Le (Mrs. Le), breached their fiduciary duty to cross-complainants Newland Pharm, Inc. dba Newland Pharmacy (Newland) and Lieu Pham by failing to give them the right of first refusal before attempting to sell to a third party, in violation of corporate bylaws. (*Le v. Pham* (2010) 180 Cal.App.4th 1201, 1203, 1211.) Upon remand for further proceedings to determine damages, the trial court found Pham and Newland's "claims as to lost profits and wages are speculative and unsupported by any credible evidence" and entered judgment for the Les on the cause of action for breach of fiduciary duty.

Pham and Newland contend the court erred in concluding they had not met their burden of proof on damages. We agree. The judgment is reversed and the matter remanded to the trial court for a new trial on damages only.

## FACTS AND PROCEDURAL BACKGROUND

Prior to 2006, Pham owned 50 percent and the Les each owned 25 percent of Newland's corporate shares. All three were directors in Newland. Pham was also the CFO and the pharmacist in charge, while Mrs. Le worked as a relief pharmacist.

The summer before, Pham and Mrs. Le were suspended from the practice of pharmacy for 90 and 30 days, respectively, and, along with Newland, were placed on probation for three years for illegally exporting drugs to Vietnam. Due to resulting financial difficulties, Newland requested its bank to increase its business line of credit from \$75,000 to \$100,000. Nevertheless, Newland's returns for the tax year beginning 2005 showed a net profit of \$1,505.

In July 2006, Mr. Le was concerned Newland was not making a profit and recommended the loan be paid off within 30 days or the directors consider dissolving Newland. When the Les told Pham they wanted to sell their shares, Pham wanted to buy

them out but was prohibited from doing so by the probation order. Pham petitioned the California State Board of Pharmacy (board) to modify her probation terms to allow her to purchase the Les' shares. The board denied her request.

The Les notified Pham they intended to sell their shares to Paul and Kimngang Hoang for \$70,000. Pham responded with a letter informing them she desired to buy their shares and needed 30 days to obtain counsel and "exercise [her] option to purchase [their] shares." The Les nevertheless sold their shares without board authorization to the Hoangs in August for substantially less and on better terms than was offered to Pham, which was prohibited by Newland's bylaws. Under the bylaws, sale or transfer of shares are "null and void" unless its terms are strictly complied with.

The next month, the Les resigned as Newland's directors and officers. Mr. Hoang did not file a change in ownership form with the board, but submitted documentation to the Secretary of State indicating he was Newland's CEO and Secretary. Pham refused to recognize Mr. Hoang in those capacities, his demands to inspect Newland's books and records, and his requests that she sign, as pharmacist in charge, applications documenting changes in ownership and status of directors or officers. In November, she submitted her own statement of information with the Secretary of State, naming herself as CEO and her husband as secretary. She notified the board of these changes in January 2007.

In March, the board issued a "cease and desist" order, shutting down Newland for a little over three months. The reasons for the closure were the failures to notify the board within 30 days of the change in ownership and corporate officers resulting from the sale of the Les' shares to the Hoangs, Mr. Hoang's repeated attempts to operate Newland without board approval while it was on probation, and his submission of documentation to the Secretary of State that he was Newland's CEO, secretary and a director, which was false because the Les never notified the board of any change in

corporate officers when they resigned from their positions and neither the board nor Pham authorized the change.

Despite the ownership turmoil, Newland's tax return for 2006 showed a slight increase in the net profit from the previous year to \$1,919. But the tax return for 2007, the year of the closure, revealed a loss of \$10,608. Although Newland could not earn money during its closure, it continued to pay its lease, utility bills, liability insurance, bank loan and its wholesaler. For the 2008 tax year, Newland's net profits rose to \$12,553.

Prior to Newland's closure, Pham's monthly salary was based on an oral agreement with the Les. Her W-2s showed she earned \$39,775 in 2005, the year she was suspended for three months, and \$67,940 the next year. When Newland reopened, Pham determined her own salary. She initially was not compensated when Newland reopened but began receiving a salary three months later. Her W-2 for 2007 shows she earned \$36,520 that year.

Upon being sued by the Les and the Hoangs (not parties to this appeal), Pham and Newland cross-complained against them for breach of fiduciary duty and other claims. The trial court found against Pham and Newland but we reversed as to the Les, concluding they breached a fiduciary duty not to violate the corporate bylaws, and remanded the matter for further proceedings to determine the amount of damages.

Following a bench trial, the court found although Pham contributed to the events leading to the 2007 closure, the Les' invalid sale to the Hoangs "was a 'substantial factor' causing that closure and/or economic harm." Nevertheless, it held Pham and Newland "failed to carry their burden of proof" on damages because the tax returns and W-2s on which they relied did not prove "any damages actually occurred." Although they showed varying yearly income and wages, they did not explain the reasons for the difference, which could include "economic downturns, differences in competing pharmacies in the area, differences in consumer preferences, advertising, etc." Newland

had problems generating a profit as far back as October 2005 when the directors signed a request to increase the line of credit, and Pham and Newland failed to discuss what impact, if any, their three-year probationary period had on Newland's profitability. Finding Pham not credible, the court rejected her testimony the "documents painted an accurate picture of the damages she and Newland had incurred" as "nothing more than mere speculation on her part" given Pham's admission "she alone determined her wages and salary, and was the sole source of the information in the W-2 forms submitted."

## DISCUSSION

### *1. Standard of Review*

The parties disagree on the appropriate standard of review. Pham and Newland assert we should review the matter de novo because the material facts were undisputed. The Les respond the substantial evidence standard applies and that the cases cited by Pham and Newland are factually distinguishable. Neither is entirely correct.

Pham and Newland's sole contention on appeal is the court erred in finding they failed to carry their burden of proof on damages. "When the trier of fact has expressly or implicitly concluded that the party with the burden of proof failed to carry that burden and that party appeals, it is somewhat misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. . . . Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 279.)

## 2. Damages

Pham and Newland contend the court erred in ruling they did not meet their burden of proof on damages. We agree.

“Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.]” (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873.) The trial court concluded “the fact that damages occurred is *not* certain” because while the W-2s and tax returns showed yearly wage and income differences, they did not explain the reason for the variation, which could have been based on a change in the economy, competition, or consumer base, among other reasons. But the failure to account for factors beyond Newland’s closure relates to the *amount* of damages that could be determined with reasonable certainty, not whether the *fact* of damages is certain.

The fact of damages refers “to the nature, existence or cause of the damage . . . .” (*Griffith Co. v. San Diego College for Women* (1955) 45 Cal.2d 501, 516, italics omitted.) The court determined the Les’ actions substantially caused Newland’s three-month closure and economic harm. During that period, Newland was unable to generate income yet continued to incur debt, and Pham earned no salary. The nature, existence, and cause of Pham and Newland’s damages were thus certain, at least for that three-month period.

Where, as here, the cause and fact of damages has been established, difficulty in ascertaining the amount of damages will not preclude recovery. (*Brown v. Critchfield* (1980) 100 Cal.App.3d 858, 872.) Under these circumstances, “[t]he law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.] This is especially true where . . . it is the wrongful acts of the defendant . . . that have caused the other party to not realize a profit to which that party is entitled.” (*GHK Associates v. Mayer Group, Inc., supra*, 224 Cal.App.3d at pp. 873-874.)

In business cases, damages are based on net profits, not gross revenue. (*Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 287.) Damages for lost profits from an established business are generally awardable where “there has been an operating experience sufficient to permit a reasonable estimate of probable income and expense . . . .” (*Piscitelli v. Friedenber*g (2001) 87 Cal.App.4th 953, 989.) “Since defendant made it impossible for plaintiff to realize any profits, it cannot complain if the probable profits are of necessity estimated. [Citations.]” (*Natural Soda Prod. Co. v. City of Los Angeles* (1943) 23 Cal.2d 193, 200.) “It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant’s conduct. [Citations.]” (*Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 884.)

“Historical data supply an acceptable basis for ascertaining lost or diminished benefits suffered by an established business. The occurrence and extent of lost profits may be ascertained with reasonable certainty from the working experience of the business, from its past volume and from other data reflecting probable future volume. [Citations.] ‘In these situations, trial courts must do the best they can and use all available facts to approximate the fair and reasonable damages under all of the circumstances.’ [Citation.]” (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 143 [“evidentiary imponderables are unavoidable”].)

Pham and Newland contend Pham’s uncontradicted testimony about their loss of income, supported by W-2s and tax returns, satisfied her burden of proof. They have not shown the court abused its discretion in rejecting Pham’s testimony as not credible on the issue of damages. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.) Nevertheless, that still leaves the undisputed documentary evidence.

Newland’s tax returns for 2005 and 2006 show respectively a net profit (“ordinary business income”) \$1,505 and \$1,919, falling to a net loss of \$10,608 in 2007,

the year of the closure. The net profit then rose back up to \$12,553 the following year. As for Pham's salary, her W-2s revealed she earned \$39,775 in 2005, when she was suspended from the practice of pharmacy for three months, \$67,940 the next year, and then \$36,520 in 2007.

The Les argue the tax returns were insufficient proof of damages absent expert testimony on lost income and profits, a comparison of sales by similarly situated pharmacies, or any other reasonable basis of computation. They rely on the rule that “[i]f the business is . . . new . . . or . . . speculative . . . , damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like.” (*Kids' Universe v. In2Labs, supra*, 95 Cal.App.4th at p. 884.) But here, Newland was not a new business. It was incorporated in 1996 and had sufficient operating experience for probable income and expense to be reasonably estimated. (*Piscitelli v. Friedenbergl, supra*, 87 Cal.App.4th at p. 989.)

Given the court's finding of causation, the tax returns provided a satisfactory basis for estimating Pham and Newland's damages. Although other factors may have contributed to the damages as the court found, a defendant's conduct need not be the sole proximate cause. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 704.) Once a plaintiff has established the amount, “if the damages proven could be reduced proportionately, that burden rests upon the defendant. [Citations.]” (*Id.* at p. 705.) “[W]here it is clear . . . a defendant has been at fault and . . . has caused some part of the plaintiff's damages, the burden of proof should rest on him to show the extent of his contribution, and . . . if he cannot sustain it he should be liable for the entire loss.” [Citation.]” (*Id.* at p. 705; accord *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756, 774.) Thus, to the extent Pham and Newland's damages were affected by “environmental variables” such as “the effect of the three-year

probationary period,” or “evidence regarding the market, any possible competing pharmacies or economic downturns in the industry,” it was the Les’ burden to prove it.

The court found, and the Les maintain, there was “sparse” evidence Pham attempted to mitigate her damages and reopen the pharmacy during the three-month closure. But the burden of proving a plaintiff failed to mitigate damages in a tort action is on the defendant, not the other way around. (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 97.)

The Les claim Pham failed to mitigate her damages because she refused to sign the change in ownership documents prepared by Mr. Hoang. But as the court noted, Pham had no obligation to accept the sale because, even if she could not purchase the Les’ shares herself, Newland’s bylaws precluded the sale of the shares to the Hoangs on better terms than were offered to her. The violation of the bylaws voided the purported sale.

The Les also assert the March 2007 cease and desist letter from the board indicates it was discussed with Pham that a change of ownership could be submitted immediately to the board, apparently assuming that would have expedited Newland’s reopening although the letter does not state that. Even if so, within three days Pham submitted and paid for a Change of Permit Request documenting the modifications in corporate officers and a few weeks later, a document entitled Certification of Personnel.

As to Pham’s claim for lost wages, the Les assert she set her own wages and salary and was the sole source of information for the W-2s. But that was only after Newland reopened following its closure by the board due to the Les’ conduct. Before that, her salary was per oral agreement with the Les. The Les cite no basis upon which to reject the W-2s for the years prior to the closure in determining Pham’s lost income. Although they maintain Pham could have mitigated her personal losses because she determined her own salary, the record shows she tried, as she did not take a salary for the first three months after Newland reopened.

The evidence compels a reversal as a matter of law. (*Shaw v. County of Santa Cruz, supra*, 170 Cal.App.4th at p. 279.) The matter is reversed and remanded for a new trial on damages.

#### DISPOSITION

The judgment is reversed and the matter remanded for a new trial on damages. Pham and Newland shall recover their costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.