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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THOMAS QUOC-THAI NGUYEN,

Plaintiff and Respondent,

v.

BRUCE TRAN et al.,

Defendants and Appellants.

G045507

(Super. Ct. No. 30-2009-00294847)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Hamilton Law Office, John Hamilton; Mazur & Mazur, Janice R. Mazur and William E. Mazur, Jr., for Defendants and Appellants.

Lee Tran & Liang, K. Luan Tran and Ray A. Mandlekar for Plaintiff and Respondent.

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Following a jury trial the court entered judgment in favor of plaintiff Thomas Quoc-Thai Nguyen against defendants Bruce Tran and Suzanne Nguyen for the sum of \$1,608,000 for breach of fiduciary duty and conversion; that sum includes \$150,000 in punitive damages. Defendants appeal on several grounds, asserting there was insufficient evidence to support the judgment and the trial court erred in excluding certain testimony, admitting certain documents, and allowing an amendment to conform to proof. We affirm.

## FACTS AND PROCEDURAL HISTORY

In 2004 the parties started a Vietnamese-language television network, Viet Hai Ngoai-Television Corporation (VHN). They were the initial directors and officers, with plaintiff serving as president, and defendants Tran and Nguyen chief operating officer and secretary, and chief financial officer and treasurer, respectively. The parties agreed they would each own one-third of the company and contribute the same share of the initial capital.

The next year VHN contracted with DirecTV to carry its programming. In the summer of 2006 VHN went on the air and received its first payment in November or December of that year.

In January 2007 defendants removed plaintiff as a director of VHN. Plaintiff then filed suit (the first action) against them and VHN alleging several causes of action. Judgment was entered in plaintiff's favor on November 3, 2008. On the declaratory relief claim the court found the parties agreed their original one-third ownership would be equally diluted in favor of a 10 percent ownership by one Niel T. Nieh. The court decreed the parties to this action would each own 22,500 shares and Nieh would own 7,500 shares; it ordered VHN to issue shares in those amounts. Plaintiff

also prevailed on his unjust enrichment cause of action, recovering \$296,000 plus interest, offset by \$22,000 the court found he had converted.

In January 2009 plaintiff levied against VHN's contract with DirecTV, seizing almost \$143,000. Within days, on January 23, defendants initiated the Debt Relief Program (DRP). As a majority of the shareholders they adopted a written consent (written consent) increasing the authorized VHN shares from 75,000 to one million. It also stated VHN owed plaintiff and both defendants more than \$200,000 each and allowed any of them to exchange up to \$200,000 of that debt for an additional 300,000 shares. A notice of the right to participate in the DRP gave shareholders until February 23 to opt to participate. On January 23 both defendants executed a document entitled "Notice of Option to Participate in Debt Relief Program" (option). (Boldface and capitalization omitted.) In it they "exchange[d] \$200,000 in debt for 300,000 shares of . . . stock . . . pursuant to the" DRP. However plaintiff refused to participate in the DRP.

On February 17 the parties entered into a stipulation to enforce the judgment (stipulation). VHN agreed to pay plaintiff \$50,000 per month until the judgment was fully paid. Plaintiff agreed to release his levy, although the parties stipulated he would keep all sums already recovered under the levy. VHN also agreed to issue a stock certificate to plaintiff reflecting his 30 percent ownership, as required by the judgment. No mention was made of the DRP. VHN ultimately made four payments of \$50,000 to plaintiff and satisfied the judgment.

On February 28, 2009, defendant Tran delivered to plaintiff two stock certificates. The first was dated January 23 and issued to plaintiff 22,500 shares out of 75,000 authorized shares. It also showed the certificate had been voided on February 28, as initialed by defendant Tran. The second certificate was dated February 28 and issued plaintiff 22,500 shares out of one million authorized shares.

In August 2009 plaintiff filed the instant action for breach of fiduciary duty, conversion, unjust enrichment, and an accounting. It alleged, among other things, that issuance of the new stock certificate diluted his ownership in VHN to about 3 percent from his original 30 percent. Defendants' primary defense was there was no dilution because the DRP had been discontinued once plaintiff refused to participate and no new shares were issued. By a unanimous vote the jury found for plaintiff on the conversion and breach of fiduciary duty causes of action, awarding \$1,458,000 in damages. By a nine-to-three vote they found defendants acted with malice, oppression, or fraud. Defendants then stipulated to punitive damages in the sum of \$150,000.

Additional facts are set out in the discussion.

## DISCUSSION

### *1. Exclusion of Testimony of Attorney Reynolds*

Plaintiff took the deposition of attorney Reynolds, who represented defendants and VHN in the first action. He testified he prepared the written consent whereby VHN adopted the DRP. But Reynolds refused to answer any questions about his conversations with his clients or his thought process regarding the DRP on the ground they were protected by the attorney-client privilege and the work product doctrine. He also refused to answer questions about what he considered in preparing the written consent on the same grounds. He declined to offer any expert opinion about the written consent because he was testifying as a percipient witness only.

Plaintiff filed a motion in limine seeking to preclude defendants from introducing any evidence or arguing about Reynolds's advice as to the DRP based on his reliance on the attorney-client privilege and work product doctrine in his deposition. Defendants wanted Reynolds to testify that his firm drafted the written consent but did not issue any new shares to defendants. They also intended to have him testify about

conversations he had with plaintiff's attorney about the written consent and the stipulation. This, they argued, was not within the scope of the work product doctrine or the attorney-client privilege. The judge granted the motion, stating that he "simply [did not] feel that Mr. Reynolds should be allowed to testify under these circumstances. It's like we're going to take a little bit of what [he] said, but we can't touch the other part. I don't want to do it." And further, "because Mr. Reynolds invoked the attorney[-]client privilege, the work product privilege, I can't allow him to testify."

The parties disagree about the standard of review. Defendants rely on the court's statement that it could not "allow [Reynolds] to testify." They claim the court made an error of law by concluding invocation of the privilege as to some questions precluded Reynolds from testifying as to the questions they proposed. Thus we should use a de novo standard.

While it is true exclusion of evidence based on the court's determination of a legal question is reviewed de novo (*Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564), we do not read the judge's statement, "I can't allow him to testify," as meaning it did not believe it had the authority to do so. Rather, in the context of the discussion, and based on the court's prior statement it did not "feel" Reynolds "should be allowed" to do so because it would be unfair, the court excluded the evidence based on exercise of its discretion.

"The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence.' [Citation.] 'Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 919.)

Defendants argue the court erred in excluding Reynolds's testimony. Both sides agree the most critical issue was whether the DRP was discontinued once plaintiff

refused to participate and the parties instead signed the stipulation setting out the payment plan. If the DRP was terminated, then plaintiff's ownership interest in VHN would not have been diluted. Defendants' position is that their lawyers conceived the DRP as an alternative to bankruptcy that would have occurred as a result of plaintiff's levy. Once the parties agreed to the payment plan, the DRP became unnecessary and was abandoned. Because no new shares were issued to defendants, the parties each owned 30 percent of the company.

In closing argument, plaintiff stated VHN never discontinued the DRP and that once 22,500 shares out of one million authorized shares were issued to him, his interest was diluted from 30 percent to 3 percent. He asserted defendants, not their lawyer, conceived the DRP and that it was not until the eve of trial that defendants claimed the DRP had been terminated. The jury awarded damages based on the 30 percent dilution. On the unjust enrichment claim, the court awarded the same amount, finding defendants' contentions the DRP was either terminated or never implemented to begin with had no credibility.

Defendants argue that had Reynolds been allowed to testify he would have stated the DRP originated with his law firm and that it was discontinued once the payment plan was agreed to. Thus, it was "highly unlikely" the jury would have awarded punitive damages.

"To preserve an evidentiary ruling for appellate review, the proponent of the evidence must make an offer of proof regarding the anticipated testimony. [Citation.] The offer of proof must address the "substance, purpose, and relevance of the excluded evidence" (Evid.Code, § 354, subd. (a)), and must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued [citation]. The trial court may reject a general or vague offer of proof that does not specify the testimony to be offered by the proposed witness. [Citations.]' [Citations.]" (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 329.)

Plaintiff asserts defendants failed to make an adequate offer of proof as to the substance of Reynolds's proffered testimony. In their written opposition to the motion, defendants argued Reynolds would testify his firm prepared the DRP documents but did not prepare any new stock certificates and that he could testify to his discussions with plaintiff's counsel about the DRP and payment plan.

As to the conversations between Reynolds and plaintiff's counsel, the offer of proof was inadequate. In the trial court defendants failed to describe what Reynolds's testimony would be as to the substance of those conversations. Now, in the briefs, defendants claim Reynolds would have testified he and defendants' lawyer "understood and agreed" the payment plan superseded the DRP. But the trial judge did not have this information and never had the opportunity to consider it in making his ruling on the evidence. Thus, defendants cannot show he abused his discretion in excluding it.

As to the other two topics, even assuming it was an abuse of discretion to exclude the evidence, which we do not hold, it did not prejudice defendants. Had Reynolds testified neither he nor his firm issued new stock certificates to defendants, it does not mean defendants did not do so themselves, despite their testimony they did not. Neither the court nor the jury was required to believe them and apparently did not find defendants credible. (*Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1263 [court not required to believe witness]; *Lee v. Ashizawa* (1964) 60 Cal.2d 862, 865 [same for jury].)

Plus there was critical testimony from plaintiff's expert. He explained that once defendants executed the option, they each became owners of an additional 300,000 shares. The option stated defendants each exchanged \$200,000 in debt for 300,000 shares of stock. That entitled them to stock. Failure to issue certificates did not change the fact. As he testified, a stock certificate is not "magical." It "is just a symbol of ownership." Thus, it was irrelevant no certificates were issued by Reynolds or his law firm.

That leaves us with excluded testimony that Reynolds’s firm prepared the DRP documents. “[T]o obtain a reversal based on the erroneous exclusion of evidence, [defendants are] required to show a ‘miscarriage of justice,’ meaning that ‘a different result was probable if the evidence had been admitted.’ [Citations.]” (*P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1348.) Defendants have not shown that it was probable they would have prevailed in the action, or even on the punitive damages claim, if Reynolds testified his firm prepared the DRP. First, defendants testified to this fact. They claim Reynolds’s testimony would have lent credence to theirs, especially because the judge stated he knew Reynolds and thought “quite highly of him.” But his opinion is irrelevant to whom the jury would believe.

Second, even if Reynolds did prepare the document, that does not mean the DRP was ever terminated or issuance of the extra shares to defendants ever rescinded.

## 2. *Sufficiency of the Evidence*

When a party claims there is insufficient evidence we start with the presumption the judgment is correct. (*Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1251-1252.) Our role is to determine only if “‘there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.’ [Citations.] We cannot reweigh the evidence, but must resolve all conflicts in favor of the prevailing party. [Citation.]” (*Ibid.*) “[W]hen two or more inferences can reasonably be deduced from the facts, [we are] without power to substitute [our] deductions for those of the trial court.” (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.) We must accept all evidence supporting the successful party, disregard the conflicting evidence, and draw all reasonable inferences to uphold the verdict. (*Minelian v. Manzella* (1989) 215 Cal.App.3d 457, 463.)

Defendants contend there was insufficient evidence to show the DRP was never terminated. They claim the “sole evidence” to support plaintiff’s position it

continued to exist was the option defendants signed January 23. They acknowledge that by itself defendants' signatures on option "suggest[]" it "was a 'done deal'" but claim we must review the entire record to determine whether the evidence supports the judgment.

Defendants' latter statement, that we review the entire record, is correct (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 951.) But that does not mean one piece of evidence will not suffice. (See *Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1144 [uncorroborated testimony of one witness supports judgment].) And while substantial evidence is not just "any" evidence, as long as the evidence is credible, reasonable, and solid, it is sufficient. (*Ibid.*) Defendants' admitted signatures on the option fulfills those requirements.

Moreover, there was additional evidence. Plaintiff's expert testified that once defendants signed the option they owned the additional shares. It was not until shortly before trial, more than two years after execution of the option, that VHN adopted a resolution to terminate the DRP. But defendants' additional shares were never cancelled. And the stipulation to enforce the judgment did not mention the DRP at all.

Further, the manner in which shares were issued to plaintiff raises a strong inference defendants did not intend to or actually cancel the DRP. On February 28, after defendants signed the option and more than 10 days after the parties entered into the stipulation, defendant Tran delivered to plaintiff two stock certificates. The first, issuing 22,500 shares out of 75,000 authorized, was dated January 23. But it also showed Tran had voided it on February 28. The second certificate, dated February 28, issued plaintiff 22,500 shares out of one million authorized. It is reasonable to infer the second certificate was issued reflecting the new number of authorized shares because defendants now each owned an additional 300,000 shares. Otherwise, plaintiff's first certificate would have sufficed. Additionally, as plaintiff points out, the second certificate

reflecting the one million authorized shares was numbered 3. It is not unreasonable to infer the numbers 1 and 2 were issued to defendants.

And, significantly, the court did not believe defendants' claim the DRP was discontinued. Presumably, neither did the jury. All this evidence is more than sufficient to support the judgment. That there is conflicting evidence that might support defendants' position is irrelevant. (*Bowers v. Bernards, supra*, 150 Cal.App.3d at p. 873.)

### *3. Admission of Evidence About VHN's Financial Statements and Tax Returns*

Defendants filed a motion in limine to exclude evidence that VHN did not file tax returns or prepare financial statements for several years. Defendants acknowledged the complaint alleged (1) defendants had not in fact loaned VHN \$400,000 but had invented it so they could acquire additional shares and dilute plaintiff's interest, and (2) they were denying plaintiff access to financial records to prevent him from discovering "their scheme." Defendants claimed the evidence was not relevant to either of these issues.

Plaintiff opposed the motion, pointing out that defendants admitted in the joint case statement that they "improperly handled [VHN's] shares and money . . . ." He also argued the evidence was relevant to the allegations in the complaint and to impeach defendants' claim VHN was not profitable. The court denied the motion on the ground the documents "appear[ed] relevant."

At trial plaintiff introduced evidence that for several years VHN had neither filed tax returns nor prepared financial statements. The court did not allow defendants to have their accountant testify that in October 2010 defendants had engaged him to prepare tax returns, which he had just completed. The court also sustained an objection to a question as to whether returns had been filed.

On appeal, defendants again argue the evidence was not relevant to any issue framed by the pleadings and its admission was prejudicial. We disagree.

Exclusion and admission of evidence in ruling on a motion in limine are within the broad discretion of the trial court. (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1156.) We reject defendants' assertion the court had no discretion because the evidence was not pertinent to the pleadings.

The complaint alleged defendants breached their fiduciary duty to plaintiff and made intentional misrepresentations about loaning money to VHN to set up the DRP. Defendants' argument that dilution only resulted from increase in shares, not whether they prepared financials or filed tax returns is too narrow. The jury was entitled to have context for defendants' actions. It could reasonably infer defendants failed to prepare financial statements to conceal the fact they never in fact made such loans or to show defendants played fast and loose with corporate books and records.

Plaintiff also alleged a cause of action for an accounting to determine how much defendants had contributed to or taken from VHN. Defendants argue that cause of action was dismissed "sometime before or during the trial." But we have no idea when and it could have been right before the case went to the jury.

Pursuant to an amendment to the complaint, as discussed below, there was also an allegation defendants used "improper accounting practices" and "enrich[ed] themselves and their relatives" by taking money from VHN to plaintiff's detriment. Failure to prepare financial statements or tax returns is relevant to this allegation.

The evidence is also relevant to the issue framed in the joint case statement that defendants did not properly handle VHN's finances or shares. And defendants' opening statement promised there would be evidence showing VHN was now profitable and had not filed bankruptcy due to defendants' sacrifices and hard work.

Furthermore, even if it were erroneously admitted, we are not convinced defendants were prejudiced by admission of the evidence. They point to the nine-to-three

vote in favor of punitive damages, arguing that it is “reasonably likely” one of them was influenced by this evidence. But there was other evidence on which the jurors could rely to find defendants acted with malice, fraud, or oppression.

For example, in January 2009, the same month plaintiff was levying on his first judgment and the same month defendants set up the DRP and executed the option, defendants doubled Tran’s salary from \$120,000 to \$240,000 and increased Nguyen’s salary to \$120,000. This was done without plaintiff’s knowledge or consent. That they deferred payment to themselves is merely additional evidence for the jury to consider. In addition, there is the evidence defendants did not terminate the DRP, revoke their additional shares and how plaintiff’s shares were issued.

Further, during the pendency of the first action, defendants opened a new bank account, estimating VHN’s annual sales as \$1.8 million with annual net profit of \$500,000. In actuality VHN had a loss of approximately \$10,000. Tran testified although he knew the information was not true and it was a “bad” thing to do, he supplied it to make VHN look good. And it was “insignificant” since VHN was not applying for a line of credit.

The court did not err in admitting this evidence and in any event defendants were not prejudiced.

#### *4. Amendment of Complaint*

On the third day of trial plaintiff moved to amend the complaint to add the following allegation: “VHN had been extremely profitable but because Defendants have engaged in improper accounting practices and used VHN’s funds as their personal piggy bank to enrich themselves and their relatives, Defendants have prevented Plaintiff from receiving his fair share of VHN’s profits.” Plaintiff argued “recently discovered evidence” revealed defendants had breached their fiduciary duty by awarding themselves “outrageously high and improper and unauthorized salaries,” thereby depleting profits to

which he was entitled. Defendants argued they would be prejudiced because they would not be able to do discovery or retain an expert. They also asserted they would have filed a demurrer. They complained plaintiff waited until just before trial to take the depositions that revealed the information. The court granted the motion, finding evidence had been introduced “that the defendants substantially increased their pay . . . at a time when I believe there might have been some monies owing to the plaintiff.” It ruled defendants would not be prejudiced because they had had “sole control of the books and records.”

The court has broad discretion to allow amendment of the pleadings during trial. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 383; Code Civ. Proc., §§ 473, 576; *Norager v. Nakamura* (1996) 42 Cal.App.4th 1817, 1819 [amendment of complaint on fourth day of four-day trial].) Although the court abuses its discretion if the amendment prejudices defendants, (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 912), defendants’ claims of prejudice are not persuasive.

They argue they would have demurred because a shareholder may seek to recover lost profits only in a derivative action. But the amendment did not seek to recover lost profits; it did not allege a new cause of action or amend the prayer. It was directed at defendants’ mishandling of the finances, which went to the breach of fiduciary duty and accounting causes of action. The complaint had already put defendants’ alleged mishandling of VHN’s finances at issue. (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2012) ¶ 12:393, p. 12-79.) Further, plaintiff did not recover lost profits.

Moreover, as discussed above, defendants put VHN’s financial condition at issue in the opening statement and via their expert who completed a report claiming VHN had lost money every year and testified VHN “was operating at a negative profit.” Defendant Tran testified VHN had never been profitable.

As to their claim they could have done discovery and retained an expert, as the court noted, defendants had control of the books and records, giving them all of the information they needed. They knew whether they had improperly taken sums from the company. They claim an expert would have testified corporations are not required to pay out dividends. But that is not the issue.

Defendants also maintain the amendment allowed plaintiff to introduce and emphasize ““newly discovered evidence,”” the bank account application where defendant Tran stated VHN had \$500,000 in profits. One of plaintiff’s experts relied on this to value VHN and plaintiff’s counsel emphasized it in his closing argument to support the claim defendants “hid the profits” and thus plaintiff was entitled to punitive damages. But, as plaintiff notes, defendants did not object to admission of the application and have forfeited any claimed error in its admission.

Defendants have not shown a reasonable likelihood the verdicts would have been more favorable or that the court erred in allowing the amendment.

#### DISPOSITION

The judgment is affirmed. Plaintiff is entitled to his costs on appeal.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.