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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RECORD STORAGE SERVICES, INC.,

Plaintiff and Appellant,

v.

HIDDEN VALLEY MOVING &
STORAGE, INC.,

Defendant and Respondent.

G045692

(Super. Ct. No. 30-2009-00124802)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Reversed and remanded with directions.

Amezcu-Moll & Associates, Rosemary Amezcu-Moll and Margaret Hughes for Plaintiff and Appellant.

Lambert & Rogers and Michael Dean Rogers for Defendant and Respondent.

Record Storage Services, Inc. (RSSI), appeals from the judgment against it in its breach of contract action against Hidden Valley Moving & Storage, Inc. (Hidden Valley). RSSI claimed Hidden Valley failed to properly pay commissions for services it provided as a moving subcontractor for Hidden Valley. It contends the trial court erred by ruling on the breach of contract cause of action following a first phase of trial that RSSI understood was only intended to determine the terms of the contract specifically as to the applicable commission rates. We agree. We reverse the judgment and remand with directions for a trial on the unresolved contract cause of action.

FACTS & PROCEDURE

Pursuant to the register of actions, RSSI filed its amended complaint against Hidden Valley in August 2009. The complaint is not in the appellate record, accordingly, we are left with the trial court's comments about the pleading to ascertain its factual allegations and causes of action.¹

The trial court explained RSSI's complaint was a form Judicial Council complaint containing causes of action for breach of contract, fraud, and breach of the covenant of good faith and fair dealing, in what was "chiefly a billing dispute under a written contract between [entities] in the moving and storage industry." RSSI (a moving subcontractor) claimed it was shorted about \$34,901 in commission payments from Hidden Valley (a moving company that was a Mayflower Transit (Mayflower) agent). RSSI alleged it and Hidden Valley had a business relationship going back to 2003 that was not reduced to writing, but sometime around January 2006, there was a written document called "'Independent Subcontractor Agreement for Inter/Intrastate Hauling'"

¹ The record on appeal consist of a reporter's transcript and a clerk's transcript that contains only the register of actions, the judgment, the notice of appeal, and the notice designating the record on appeal. Additionally, eight original trial exhibits, some admitted into evidence, some not, have been lodged with this court by Hidden Valley (Cal. Rules of Court, rule 8.122 (a)(3)), other trial exhibits have not been provided.

(the Subcontractor Agreement) between RSSI and Hidden Valley, that identified Hidden Valley as an agent of Mayflower operating under permits issued by the California Public Utilities Commission (PUC), and RSSI as one of its independent “sub-haulers” (i.e., subcontractor). The written contract (which did not guarantee RSSI any amount of work), provided RSSI’s compensation for hauling services would be “‘specified in schedule A, which represents negotiations between [RSSI] and [Hidden Valley]’ and ‘[t]his compensation may be negotiated during the term of this agreement based on the circumstances of a given project.’”

The trial court observed there was in fact no schedule A to the written contract attached to the complaint. We observe much of the dispute is about whether there ever was a schedule A (which listed Hidden Valley’s standard commission rates it paid all of its subcontractors) attached to the Subcontractor Agreement, or whether the commission rates Hidden Valley agreed to pay RSSI were higher rates orally agreed upon. The trial court additionally observed the dispute identified in the complaint also concerned “something called a DSPR report . . . ,” but the pleadings did not identify what the report was. The complaint alleged Hidden Valley “suppressed material data contained in DSPR report[s] showing the true amount [RSSI] was owed for a job,” “deducted arbitrary amounts from the amount owed to [RSSI],” and secretly withheld funds due and owing to RSSI.

On June 20, 2011, the parties reported ready for trial before Judge James Di Cesare. RSSI had requested a jury trial, which its counsel estimated would take 14 days, but it now agreed to a court trial. RSSI’s trial counsel advised the court RSSI claimed to have been underpaid by Hidden Valley on about 300 accounts/jobs. Most of its claims had to do with disputes over the commission percentage Hidden Valley was supposed to pay RSSI on each job, but “a handful” of the accounts had nothing to do with “percentage disputes” but rather with “alterations to the contract.” The court implored counsel to find a way to shorten the trial estimate. RSSI’s counsel suggested if the court

first addressed the “core principal terms of the contract” (i.e., the percentage owed dispute), which at the time she estimated would take seven days to try, then the court could conduct a second phase addressing the math on the 300 or so disputed accounts, i.e., “[do] the math,” which would take another four days. The court directed counsel to work out a stipulation for how to proceed with trial and the case was assigned to Judge Derek W. Hunt for a court trial.

During an extensive pretrial discussion before Judge Hunt, counsel again explained much of the dispute was over the applicable commission percentages. RSSI’s position was there no schedule A attached to the written Subcontractor Agreement, and it had negotiated higher commissions for several services, so the proper commission rates had to be established by testimony about the oral agreements. RSSI proposed to establish the applicable commission percentages through evidence of the parties’ “course of dealings” and “pattern and practice.” Hidden Valley’s position was its standard rate schedule applicable to all subcontractors would have been schedule A to the Subcontractor Agreement. Counsel explained much of the disagreement was about whether RSSI was supposed to receive as its commission 60 percent (specified in Hidden Valley’s standard schedule of subcontractor commission rates) or 80 percent of the fees Hidden Valley received for “shuttle service, which is when a moving van can’t get to the house, or whatever it is being moved, they have to use a smaller vehicle--a shuttle--to go over there and take the property and move it over to the van.” Counsel suggested the court try the first phase to determine “the actual terms of the contract[,]” e.g., “80 percent versus 60 percent . . .” and the second phase “would be solely about the damages[, because it is a math game.”

After a short break, there was further discussion about what was really at issue in the first phase of the trial. The trial court commented on “the boxes [of evidence] there--which I look at with great distaste, because it looks like more evidence than I need . . .” The court chastised the parties for not being “cooperative enough to settle the

case” and said that it was “not prepared to have an argument in the superior court of the state of California over nickels. I’ve got other things to do. . . . it sounds like a bookkeeping job to me” The trial court explained it was not inclined to do an accounting for the parties—if the contention was that RSSI had not been properly paid on all 300 accounts, then the appropriate course was to appoint a referee to do an accounting. RSSI’s counsel explained an accounting was not necessary “because if a determination is made that . . . it’s 80 percent versus 60 percent, the math has been done. If the ruling is that its 60 percent, then you know, the math is easily ascertained.” Counsel stated the court should “determine what the actual terms of the contract were--because that’s where the difference lies.” The math was already done. Counsel wanted the court to decide the agreed upon commission percentages.

The court asked RSSI’s counsel how she was going to examine RSSI’s witness, its principal Jonathan Petersen—what the “road map” was. Counsel for both sides agreed Peterson would be questioned by being given a copy of the Hidden Valley 2005 standard commission rate schedule that listed 36 items followed by the percentage that would be paid to subcontractors. They would then question Peterson as to the categories of service he disagreed with the standard percentage (i.e., the amount that was paid to him pursuant to the rate schedule) as opposed to the percentage he believed he should have been paid pursuant to their oral agreement.

RSSI’s Case Begins

Petersen testified he was president and general manager of RSSI. RSSI began doing work for Hidden Valley in 2002 pursuant to an oral agreement. Petersen negotiated with Hidden Valley owners Bob Berti and Chris McClenaghan, and Hidden Valley employee Roland Gutierrez that RSSI would be paid standard industry commissions “with a few exceptions” to which Hidden Valley agreed. About seven categories were in dispute. For example, for interstate moves RSSI was to get “50 percent of the origin commission” instead of the industry standard, which was

“50 percent of the booking commission.” RSSI was to get “12 percent for local, intra, and O & I moves” instead of the standard 10 percent; and 12 percent for “packing labor and packing material” instead of 10 percent. In 2004, Petersen told McClenaghan he needed 80 percent for shuttles instead of the 60 percent rate they were paying, and McClenaghan agreed.

Petersen testified that in January 2006, he signed the written Subcontractor Agreement with Hidden Valley, but it did not have a schedule A commission rate attached—the commission rates were all “given to me verbal[ly] and agreed to verbally.” The crating commission was always paid correctly, but “the shuttles were paid two or three times at 80 percent, then it ceased to be paid correctly” In March 2006, Petersen complained to McClenaghan, and McClenaghan again agreed to go back to paying RSSI the 80 percent commission on shuttles. RSSI introduced into evidence exhibit 318, which it titled ““Pattern and Practice”” examples consisting of 509 pages of complied invoices, Hidden Valley account payment records, and notes written by Petersen as to each transaction that he testified were paid at the higher agreed upon commission rates (e.g., 80 percent for shuttle jobs).

Petersen testified he generally knew how much he should get paid for a job because he would have Hidden Valley’s customer estimate before he performed the requested services. When the move was completed, Petersen would compute the actual customer charges and collect from the customer. He would then turn in the paperwork and collections to Hidden Valley, and be paid a percentage “based on our agreement.” Accounts were settled every two weeks, and RSSI would receive account summaries from Hidden Valley showing the revenue Hidden Valley received, the percentage to be paid to RSSI, and the amount paid. Additionally, Peterson testified Mayflower generally prepared a revenue display report (aka DSPR) which showed revenue collected from the customer for the moving services and how the revenues were distributed between the various entities (i.e., Mayflower, Hidden Valley, and RSSI). Up until June 2003,

Petersen had access to that system and if he saw he had not been paid the correct commissions, he would ask Heather Hawkins (who handled billing for Hidden Valley) to correct it. In June 2003, Petersen's access to the DSPR was cut off—Hawkins said it was because the system contained proprietary information.

Around January 2007, Jennifer Armstead took over Hidden Valley's billing and she began paying RSSI the "lesser amounts" (i.e., Hidden Valley's standard commissions). When Petersen complained to Armstead, she said no one at Hidden Valley recalled agreeing to pay RSSI higher rates. Petersen complained to McClenaghan, who also denied having agreed to higher commission rates.

The Subcontractor Agreement RSSI attached to its complaint was admitted into evidence as exhibit 1. Petersen testified he signed the Subcontractor Agreement on January 23, 2006. It was not signed by anyone from Hidden Valley when he received it and he did not see anyone from Hidden Valley sign the Subcontractor Agreement. He mailed his signed copy back to McClenaghan, and after repeated requests, got a fully signed copy back. The Subcontractor Agreement was signed by David Vanderheiden, Hidden Valley's public safety officer. The rate schedule (Schedule A) was not attached.

Petersen testified RSSI claimed it was owed an additional \$34,901 based on the percentage differentials on accounts (i.e., what he should have received if he was *always* paid the higher percentages orally agreed upon for various services, instead of only sometimes being paid the higher percentages). When RSSI's counsel asked Petersen if there were also "computational errors" on accounts where there was no dispute as to the correct percentage. Hidden Valley's counsel objected to the question, "I thought we were doing a phase 1 on the terms of the contract." When the court interjected asking RSSI's counsel how much the additional "computational errors" were, she could not say—she had not done the math on those claims—but she thought it could be about equal to about one-third of RSSI's percentage differential claim. The court chastised RSSI's counsel to figure out what she was asking for, "I'm not a

bookkeeper. . . . [¶] Let's just stick with the course of dealing evidence right now.”
RSSI's counsel agreed, saying she would reserve RSSI's right to bring up “that testimony” (i.e., about additional computational errors) in phase 2, to which the court replied “of course.”

Cross-examination

On cross-examination, Petersen agreed he had received e-mails from Armstead and Hidden Valley manager Jim Shaffer in 2007 denying Hidden Valley had agreed to always pay 80 percent on shuttles. He continued taking jobs from Hidden Valley and was paid a 60 percent commission on shuttles. He would routinely submit requests for the commission to be changed to 80 percent but was continuously rebuffed. Hidden Valley stopped sending work to Petersen after February 2009.

When RSSI's counsel was done with her examination of Petersen, she had no other witnesses ready to go. The court reminded counsel she was on “the liability phase of the case” and asked her if she had any other witnesses. She replied, “not for the liability phase at this stage.” She announced she was ready to rest subject to whatever the defense did in its “[case-in-chief] on liability.”

Hidden Valley's case

McClenaghan, vice president and an owner of Hidden Valley along with his father, Berti, testified Hidden Valley would have had a written agreement with RSSI from the outset (i.e., 2002) because Hidden Valley's practice was to require all subcontractors have written contracts, and written contracts would always be required for the subcontractor to obtain the necessary insurance. But he could not produce a written contract from 2002. He explained that in 2001-2002, Petersen had his own agency agreement with Mayflower but was getting behind on his lease. Hidden Valley took over Petersen's lease, and acquired a few pieces of equipment.

McClenaghan (and Berti) denied Hidden Valley ever agreed to pay Petersen anything other than the standard rates it paid all its subcontractors. He denied

agreeing to always pay Petersen 80 percent on shuttles instead of the standard 60 percent, or to pay the other higher rates. Rather, when there were “extenuating circumstance[s] [¶] . . . something that was above and beyond what a normal shuttle is . . . we agreed to pay him 80 percent. But a standard shuttle was still 60 percent.” Hidden Valley paid Petersen the higher commission between 30 and 50 times over the years. McClenaghan explained that after jobs, Petersen was often trying to “work another deal” and convince McClenaghan to pay higher percentages, but there was never an agreement to *always* pay the higher amounts. None of Hidden Valley’s subcontractors had special arrangements for higher commissions—everyone was paid the standard commission rates.

With regard to the contract signed January 2006, McClenaghan explained the named signed for Hidden Valley was his uncle, David Vanderheiden. McClenaghan was very familiar with his uncle’s signature, because he was one of the signers on the company checking account, and the signature on the written contract was not his uncle’s. Moreover, Vanderheiden was not an officer of the company and had no authority to sign contracts on its behalf—only McClenaghan and Berti could sign contracts. Nonetheless, McClenaghan testified there was a written contract with Petersen—the standard subhauler contract signed by all 35 of Hidden Valley’s independent subcontractors—and the contract would have had the standard rate schedule attached.

McClenaghan denied Petersen was given access to DSPR reports because they contained proprietary information, and no subcontractor was given access to them. Rather, a subcontractor knew he or she was being paid properly because the rates Hidden Valley could charge are all controlled by the PUC. The subcontractor would have the estimate before doing the work and know the standard commission rate for the job. Furthermore, the subcontractor would know what work was actually performed and what the customer paid because he would be the one filling out the paperwork at the jobsite and collecting payment from the customer.

Jim Shaffer, regional manager for Hidden Valley, similarly denied ever agreeing to special rates for RSSI. The standard commission for shuttles was 60 percent. If there were extenuating circumstances, Hidden Valley might pay 80 percent.

End of Phase I

After both sides rested their “phase 1 case,” RSSI’s counsel made her closing argument stating the phase had been about whether there was a breach of contract. Counsel argued there was substantial evidence the contract Petersen signed in January 2006 did not have a schedule A attachment. She argued the parties’ course of dealings—the pattern and practice—as evidenced by payment records RSSI produced where he was paid the higher commissions, demonstrated RSSI was entitled to the higher commission rates, not Hidden Valley’s standard rates, on *all* jobs.

Hidden Valley’s counsel argued the 2006 written contract either did include, or was intended to include, Hidden Valley’s standard commission schedule as an attachment. It was absurd to think Hidden Valley would have negotiated different commission rates with so many different subcontractors. Moreover it was unreasonable to claim the pattern and practice was to always pay higher commissions, when the whole point of the case was that Hidden Valley was not always paying higher commissions—it was mostly paying the standard commissions.

Ruling

When it ruled, the trial court commented that phase 1 was the “liability phase,” which came down to whether RSSI had met its burden to prove by a preponderance of the evidence that Hidden Valley had breached a contract with RSSI to pay higher commission rates than the standard rates Hidden Valley paid. The court stated it found Petersen’s testimony lacked credibility. The court found RSSI had not demonstrated the parties had a contract to pay higher commissions based on their pattern and practice, or course of dealing, because the times when higher percentages were paid

were “anomalies” where the extenuating circumstances justified Hidden Valley paying more.

The court then discussed what phase 2 would address. It noted phase 2 was supposed to be on damages, but as RSSI failed to prove Hidden Valley breached a contract so there could be no contract damages. The court asked RSSI’s counsel to consider overnight how or if she wanted to proceed with the fraud/equity causes of action, which were the only ones she had left. The court recessed for the evening.

The next morning, RSSI’s counsel asked the court for clarification of its phase 1 ruling. She argued she had only stipulated to phase 1 to decide the terms of the contract—i.e., what percentages did the parties agree RSSI would be paid for each type of service. Phase 2 would address whether the contract on whatever terms the court decided—those asserted by RSSI (higher commissions orally agreed upon) or those asserted by Hidden Valley (standard commissions set forth in its 2005 commission schedule), was breached. The court commented there was no need to have stipulated to trial phases because the court was entitled to direct the order of proof. Phase 1 was on contract liability, which had not been proved. When RSSI’s counsel persisted that only the terms of the contract were at issue on phase 1, the court replied there had not been a declaratory relief cause of action—only breach of contract, which had not been proven. Counsel again insisted RSSI was still entitled to a trial on “the accounts” to determine if it had been paid properly under whatever the contract terms were that the court decided. The court reiterated, the cause of action was for breach of contract, which had been tried, and the court had found there was no breach of contract. All that was left was the fraud cause of action. RSSI’s counsel declined to go forward with the fraud cause of action and judgment was entered for Hidden Valley.

DISCUSSION

RSSI argues the trial court abused its discretion when it ruled against it on the breach of contract cause of action at the conclusion of the first phase of the trial. It

argues counsel and the trial court agreed phase 1 was to decide the terms of the contract, i.e., the applicable commission percentage where the parties could not agree as to what commission percentage applied (e.g., 80 percent or 60 percent for shuttles etc.). The trial court improperly ruled there was no breach of contract *before* RSSI had the opportunity to present evidence on claims that even if Hidden Valley’s standard commission schedule applied, there were still unpaid commissions. We agree.

“A party is entitled to have received in evidence and considered by the court, before findings of fact are made, all competent, material, and relevant evidence which tends to prove or disprove any material issue raised by the pleadings. [Citations.]’ [Citation.] It is within the sound discretion of the trial court to define the issues and direct the order of proof but that may not be so done as to preclude a party from adducing competent, material, and relevant evidence which tends to prove or disprove any material issue. [Citations.]” (*Foster v. Keating* (1953) 120 Cal.App.2d 435, 451-452; see also *Estate of Horman* (1968) 265 Cal.App.2d 796, 808.)

The trial court’s ruling on the breach of contract cause of action at the end of phase 1 denied RSSI the opportunity to present evidence on material issues relative to its breach of contract cause of action.² RSSI sued Hidden Valley for breach of contract claiming it had not been paid all commissions owed for work it performed for Hidden Valley. For most services, RSSI agreed it was to receive Hidden Valley’s standard commission, but as to some categories (including shuttles), RSSI contended it had

² RSSI makes no arguments relating to its fraud or breach of implied covenant of good faith and fair dealing causes of action, accordingly we considered them abandoned. Additionally, RSSI in passing complains the trial court failed to address its counsel’s complaints about Hidden Valley’s failure to bring requested documents to trial. Given there was no offer of proof below, and no analysis of the claim on appeal, we consider the point waived. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*) [“When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived”].)

negotiated higher commissions. But RSSI was claiming damages (unpaid commissions) not only based on the commission percentage differential (e.g., it should have received 80 percent for *all* shuttles, but Hidden Valley only gave it 60 percent on many shuttles), it also claimed that even where there was no dispute as to the applicable commission percentage, commissions were underpaid. Counsel for both sides clearly envisioned the first phase of the trial was to address the terms of the contract, i.e., the applicable commission percentages. Once the applicable percentages were decided, the parties would then in phase 2 litigate whether the proper percentages were paid. In other words, even if Hidden Valley won the day on the percentage issue—the court concluded the standard rate schedule applied and no special higher percentages had been agreed upon—there was still the issue of whether RSSI was properly paid the standard rates on each of the disputed accounts.

Hidden Valley’s attempt at defending the trial court’s ruling by asserting phase 1 was intended to be the breach of contract “‘liability’ phase, not just a determination of percentages,” is contradicted by its actions below. Indeed, when RSSI’s attorney attempted to introduce evidence beyond the percentage dispute, Hidden Valley’s counsel objected it was beyond the scope of phase 1, which was only to be about the terms of the contract. The trial court responded saying it agreed and it told RSSI’s counsel, “I’m not a bookkeeper. . . . [¶] . . . Let’s just stick with the course of dealing evidence right now.” RSSI’s counsel agreed, saying she would reserve RSSI’s right to bring up “that testimony” (i.e., about additional computational errors) in phase 2, to which the court replied “of course.”

Hidden Valley also attempts to justify the trial court’s breach of contract judgment by invoking the doctrine of implied findings, which is applicable here because RSSI did not request a statement of decision (Code Civ. Proc., § 632). The doctrine of implied findings requires we infer the trial court made all factual findings necessary to

support the judgment, and we indulge all intendments and presumptions in favor of the judgment. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58-59.)

Hidden Valley argues that applying the doctrine of implied findings, we should conclude the trial court found RSSI “utterly failed to prove” an essential element of its cause of act—the existence of “[t]he contract itself.” And having failed to prove the existence of a contract, RSSI’s breach of contract claim necessarily fails. But Hidden Valley’s argument ignores we only infer findings that are supported by substantial evidence. (*Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 66.) While it can be inferred from the court’s ruling it rejected RSSI’s claim Hidden Valley had agreed to always pay commissions that were higher than the standard commissions it paid, that is not tantamount to a finding there was no contract. Indeed, Hidden Valley steadfastly asserted below, and its witnesses all testified to the written contract between RSSI and Hidden Valley. The issue at the first phase was whether the contract terms included paying the higher commissions as RSSI claimed or the lower commissions Hidden Valley claimed. The trial court left unresolved whether even under the standard commission schedule Hidden Valley asserted applied, there were accounts that were not properly paid. RSSI was entitled to present evidence on that claim.

We observe the trial court’s conclusion there was no breach of an agreement to always pay higher commissions, resolved much of RSSI’s claim. RSSI’s counsel represented that if the higher commission rates applied, then it was shorted by \$34,901. By counsel’s estimate, the remaining contract claims (underpaid commissions on the standard commission schedule) were about one-third of that amount. But the trial court’s obvious impatience with the smaller amount of the remaining claims does not

justify entering judgment against RSSI without a trial.³ Accordingly, the matter must be remanded for trial on RSSI's unresolved breach of contract claims.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to conduct trial on the breach of contract cause of action. Appellant is awarded its costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.

³ We observe that such impatience on the part of this trial court has resulted in reversal in other cases. For example, in *In re Marriage of Hipp* (Aug. 1, 2007, G036881) [nonpub. opn.], the trial court “balked at valuing and allocating” community properties stating it would just order them sold and the proceeds divided because “I’m not inclined to sit here and listen to appraiser after appraiser to tell me what the [properties are] worth on this block this week. I don’t want to hear it. You guys want to come to some treaty back out there in the hall and say you got this property, you got this property, that is fine with me; but that is a settlement. That could have been affected years ago.’ [The trial court] declared, ‘I’m not a settlement judge, I’m a trial judge.’” In *CPH 2, LLC v. Couig* (Aug. 11, 2010, G042403) [nonpub. opn.], the trial court refused to consider an issue raised by defendant in his demurrer and motion to strike “referring to it as appropriate for an ‘evidentiary’ hearing[,]” but when defendant then attempted to raise the issue in the context of an evidentiary motion, “admonish[ed defendant] that it had ‘already ruled’ on the issue, and ‘[I] don’t appreciate having been asked to do it again.’” And in *Fatica v. Superior Court* (2002) 99 Cal.App.4th 350, 353, this court reversed an order excluding testimony of plaintiffs’ expert witness observing, “This trial court’s apparent rush to preclude [plaintiffs] from presenting critical expert opinion testimony is alarming. Instead of gutting [plaintiffs’] case (for what was, at best, a minor infraction that was correctable), there were reasonable alternatives.”