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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AIRPARTS EXPRESS CORP.,

Plaintiff and Respondent,

v.

AIRCRAFT CONNECTION CORP. et al.,

Defendants and Appellants.

G046345

(Super. Ct. No. 30-2009-00121892)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Andrew P. Banks, Judge. Affirmed.

Rogers, MacLeith & Stolp and Douglas R. MacLeith for Defendants and Appellants.

Affeld Grivakes Zucker, David W. Affeld and Loren J. Beck for Plaintiff and Respondent.

Defendants Aircraft Connection Corp., Gustav Cardenas and Cesar Cardenas appeal from a judgment for breach of contract and conversion entered in favor of Airparts Express Corp. (Airparts.) Their primary contention is that the evidence is insufficient to support the judgment. However, several of defendants' claimed facts are unsupported by any citation to the record and we consequently disregard them. Further, as Airparts points out, defendants have not provided us with a fair summary of all the evidence bearing upon the findings they claim are unsupported and thus have failed to sustain their burden of demonstrating the evidence is insufficient.

Defendants also contend the court erred by awarding Airparts breach of contract damages based on their failure to return Airparts' inventory. They argue Airparts did not allege that failure qualified as a breach of contract, and thus they were deprived of proper notice of the specific relief sought. We are unpersuaded. Defendants' argument confuses the *relief* sought by Airparts with the *legal theory* pleaded. The relief Airparts sought against defendants was money damages, including an amount sufficient to compensate Airparts for the value of its inventory which defendants allegedly sold to third parties while it was stored at their facility. That is the relief the court ordered. In any event, the issue is moot, because the court found that relief to be proper based on both a breach of contract theory *and a conversion theory*, and defendants do not challenge the latter as a basis for the recovery.

Finally, defendants contend the trial court erred in denying their motion for new trial on the ground of newly discovered evidence. Despite acknowledging their bare bones approach to defending the case, which eschewed conducting any pre-trial discovery, defendants assert the court erred by concluding they failed to demonstrate the newly discovered evidence could not have been discovered prior to trial with reasonable diligence. We affirm the judgment.

FACTS

Airparts filed its complaint in April 2009, seeking relief based on theories of breach of contract, conversion, deceit, unfair competition, an open book account. In support of its claims, Airparts alleged it entered into a written “Strategic Alliance and Confidentiality Agreement” with defendants and a related entity called Aerospace Parts.

The agreement, the written portion of which is attached as an exhibit to the complaint, identifies defendant Aircraft Connection, Corp., as a manufacturer of aircraft parts. It then specifies that all three defendants, along with Aerospace Parts, will be referred to collectively as “ACI” and are each bound by the terms of the agreement. ACI then agrees “to sell all of its [a]ircraft [p]arts exclusively and solely through” Airparts.

Airparts, in turn, is identified as a “distributor [of] aircraft parts,” and the owner of both “a network of sales outlets” and “a proprietary database of information which allows [it] to compare prices and availability of parts in the [a]ircraft [p]arts industry.”

The agreement defines, in broad terms, “[p]roprietary [i]nformation” and “[c]ompany [m]aterials” owned by Airparts. The latter is defined to include “samples, prototypes, models, products and the like.” The agreement then specifies that both the proprietary information and the company materials will remain forever the sole property of Airparts. Defendants agree they will not remove any “[c]ompany [m]aterials” from Airparts’ premises, and will not deliver them to any person or entity outside of Airparts.

The agreement also obligates defendants to refrain from engaging in any acts which are competitive with Airparts’ business during its term, and precludes them from assisting any other person or organization in competing with Airparts. It also specifies that defendants may not improperly use or distribute Airparts’ database to third parties or release any of its trade secrets.

What the agreement does not do is reveal the nature of the parties' "[s]trategic [a]lliance," or specify their obligations with respect to it. To the contrary, the agreement frankly acknowledges it "does not purport to set forth all of the terms and conditions of this [s]trategic [a]lliance and that [defendants have] obligations to [Airparts] which are not set forth in this [a]greement."

Airparts alleged that in about November 2008, defendants began circumventing the agreement by using Airparts' computer database to contact its customers. Moreover, it claimed defendants also "entered into contracts with various entities, in violation of the [a]greement."

Airparts also alleged that "[a]s part of the [a]greement," it has "stored numerous aircraft parts at [defendants'] facility and placed some of the parts on consignment with [defendants.]" Defendants allegedly "sold aircraft parts and other property owned by [Airparts] without paying sums due to [it.]" Defendants are alleged to "have taken [a]ircraft parts and other personal property owned by [Airparts] and converted the same to their own use, possession and control," "retained . . . money and property to the exclusion of [Airparts] which rightfully belong[s] to [it]," and "not provided any accounting of [Airparts'] parts which [defendants] sold."

According to the complaint, defendants "entered into the [a]greement with [Airparts] specifically to obtain [its] aircraft parts and database of customer contacts so as to usurp control over [its] property and customer base."

Defendants filed an answer to the complaint, but apparently conducted no discovery. They were sanctioned for failing to properly respond to Airparts' discovery. In May 2011, the case was tried to the court, without a jury. Airparts' principal, Robert Prestwood, testified on its behalf. Among other things, he explained the primary goals sought to be achieved by the parties' agreement. According to Prestwood, because defendant Aircraft Connection was a government licensed and bonded aircraft repair facility, associating with it would allow the existing inventory Airparts owned to be sold

for higher prices; and defendants would, in turn, be able to expand their customer base for the aircraft parts they manufactured, by selling them through Airparts. Defendants would retain 30 percent of the price of any of Airparts' inventory they sold, and Airparts would retain 30 percent of the price of defendants' parts it sold.

Prestwood also testified that approximately a month after the parties entered in to their written agreement, Airparts closed down its existing warehouse and shipped its inventory of parts to defendants' warehouse in Miami, Florida. As Prestwood explained: "because we were partnering with Cesar and Gus's organizations, and they're an FAA 8130 repair station, at their suggestion and our agreement, it was better to have everything at their location because things could be inspected and retagged to a higher degree, which adds value, and that we could both sell them out of the same warehouse down in Miami. And we'd all be there, and we'd all have access to this inventory, and it would be more profitable for everybody concerned."

When the parts arrived at what was characterized as the "Miami warehouse of Aircraft Connection," Prestwood was there to help unload it. He testified that he was joined in that effort by both defendants Cesar and Gustav Cardenas, along with employees of both Airparts and defendant Aircraft Connection. He later testified Airparts leased the warehouse space "from the Cardenases," but then acknowledged the space might have been subleased from Aerospace Parts – the other entity identified as bound, alongside defendants, by the parties' written agreement.

Although the Airparts inventory appeared to be intact when Prestwood left Florida to spend Christmas in California, the parties' relationship soured shortly thereafter, and in February or March 2009, Prestwood discovered a substantial portion of the inventory was missing. He immediately called defendants to inquire about what happened to it, and they denied knowing anything about it. They refused to provide any accounting of the missing inventory.

Prestwood also testified about both the retail and replacement value of the missing inventory, based on his expertise derived from 13 years in the industry, his experience with prior sales and the price paid for the inventory by Airparts. The court also ruled Prestwood could testify “as an officer of the company in that business as to what the company believed the value was.”

Defendants were represented by counsel at trial, but presented no witnesses or evidence. Their defense was confined to cross-examining Prestwood and offering objections.

Following the trial, the court issued a tentative decision in favor of Airparts. That tentative decision reflected a finding in favor of Airparts on theories of breach of contract and conversion. Specifically, it found defendants were liable on both theories based on their failure to return aircraft parts valued at \$961,575 to Airparts, upon termination of the parties’ agreement. The court also found defendant Aircraft Connection liable to Airparts for an additional \$13,190 in breach of contract damages “for rejected manufactured parts.”

In October 2011, nearly four months after the court’s tentative decision, defendants moved for a new trial based on newly discovered evidence. Their motion was supported by a one-page declaration from their counsel, which related he had learned of the new evidence – a series of documents filed in a bankruptcy case involving Airparts’ principal – as a result of an e-mail he received from another attorney in June 2011. Counsel stated, in conclusory fashion, he *believed* the documents “could not with reasonable diligence have [been] discovered and produced at trial,” but offered no factual support for that belief.

Airparts opposed the motion, pointing out, among other things, that defendants had made no showing that the evidence they were relying on could not have been discovered earlier with reasonable diligence. The court denied the motion on that

ground. On October 20, 2011, the court entered a judgment consistent with its tentative decision.

DISCUSSION

1. Insufficiency of the Evidence

Defendants first assert the evidence submitted at trial was insufficient to support the judgment in favor of Airparts. However, they fail to acknowledge the heavy burden imposed on an appellant who attacks a judgment on that basis.

“An appellate court “must *presume* that the record contains evidence to support every finding of fact” (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887, italics added; see *Brown v. World Church* (1969) 272 Cal.App.2d 684, 690, [“a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact”].) It is the appellant’s burden, not the court’s, to identify and establish deficiencies in the evidence. (*Brown v. World Church, supra*, 272 Cal.App.2d 684, 690.) This burden is a ‘daunting’ one. (*In re Marriage of Higinbotham* (1988) 203 Cal.App.3d 322, 328-329.) ‘A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable*, and *show how and why it is insufficient*. [Citation.]’ (*Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 208, italics added.) ‘[W]hen an appellant urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked his responsibility in this respect.’ (*Hickson v. Thielman* (1956) 147 Cal.App.2d 11, 14-15.)” (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.)

Instead of summarizing the entirety of the evidence bearing on any of the court's factual findings, defendants simply focus on selected bits of Prestwood's testimony and argue why those bits, viewed in isolation, are insufficient to prove various facts. For example, they point to the part of Prestwood's testimony where he first states the Miami warehouse space was leased from "the Cardenases" but then almost immediately acknowledges the space may have been subleased from Aerospace Parts and that he wasn't personally involved with the details of the lease transaction. Defendants argue Prestwood's admitted lack of clarity about the identity of Airparts' lessor is significant, although they don't explain why. More significant for our purposes is the fact defendants themselves fail to acknowledge the record also establishes that *Aerospace Parts is simply another entity owned by the Cardenases*. And having failed to acknowledge this additional evidence, they also make no effort to explain why the court could not have reasonably concluded that for purposes of establishing defendants had control over the Miami warehouse space, it was immaterial whether it was leased directly from the Cardenases or from Aerospace Parts.

Similarly, defendants selectively quote a dozen questions and answers found within eight pages of the reporter's transcript to support their contention "there was no evidence that the defendants even had access to the space during the time that inventory allegedly disappeared" And again, defendants fail to acknowledge other evidence bearing on that point; i.e., Prestwood's earlier testimony that the primary reason for moving the inventory to the Miami warehouse was so that "we could both sell [it] out of the same warehouse *And we'd all be there, and we'd all have access to this inventory*"

Finally, defendants assert there is insufficient evidence to support the court's award of damages, but do so without even acknowledging the court's explicit ruling that Prestwood, as an officer of Airparts, was competent to testify to the company's own valuation of its property. If defendants wished to dispute that ruling, it

was incumbent upon them to offer legal authority demonstrating it was incorrect. They have not. Moreover, defendants give obvious short-shrift to the foundation Prestwood offered for that valuation, claiming he simply “obtained his numbers from a place called “I.L.S.”” But that is not what Prestwood said. He explained his numbers were based on valuations provided by “*Inventory Locator Service* owned by Boeing,” which he characterized as “the most respected source in the business.” If defendants wished to cross-examine Prestwood about the bona-fides of that service, they were free to do so. But as it stands, our record establishes (1) that Airparts supported its damage claim with valuations provided by a highly respected resource in the airplane parts industry, and (2) defendants failed to mention that while attacking the sufficiency of the evidence.

As all of these examples illustrate, defendants failed satisfy their obligation to “summarize the evidence [both] favorable and unfavorable, and show how and why it is insufficient” to support the trial court’s findings. (*Roemer v. Pappas, supra*, 203 Cal.App.3d at p. 208.) We consequently reject their claim that the evidence was insufficient to support the judgment.

2. *Breach of Contract Damages for Lost Inventory*

Defendants also briefly challenge the court’s decision to hold them liable for breach of contract based on their failure to return Airparts’ lost inventory. They argue Airparts did not allege that failure to be a breach of the parties’ contract, and thus they were deprived of proper notice of the specific relief sought. We are unpersuaded.

Initially, we note that *In re Marriage of Lippel* (1990) 51 Cal.3d 1160, the authority defendants rely upon to establish their right to “notice of [the] lawsuit and notice of [the] specific relief which is sought,” reflects the due process requirements for a judgment entered *by default*, and thus has no application here. Because defendants answered the complaint and participated at trial, there is simply no question they had “notice of the lawsuit.”

Moreover, it is also clear defendants had notice of the specific relief sought by Airparts, which included *money damages* in an amount sufficient to compensate for the value of the inventory it alleged defendants had wrongfully taken. That is the *relief* the court granted. (*Conservatorship of Kayle* (2005) 134 Cal.App.4th 1, 5 [“[t]he complainant sought compensatory and punitive damages, costs, and other relief”].) “Breach of contract” is a legal theory supporting recovery, not a category of relief. (*Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1286, fn. 4 [distinguishing among legal theories of “breach of contract,” “tort” and “violation of a statute”]); and a cause of action is properly stated “if facts were alleged showing entitlement to relief under any possible legal theory.” (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 321-322.) Defendants have failed to demonstrate any failure of due process.

But even if the court had erred by awarding compensation for the lost inventory based upon a breach of contract theory, it would not warrant any change in the judgment. The court found defendants liable for *the same damages* on a conversion theory as well and they do not challenge the propriety of recovery under that theory. Only one theory of recovery is required to uphold the award.

3. Denial of New Trial

Defendants also challenge the court’s order denying their motion for a new trial. However, their argument, which spans only one page of their brief, is unsupported by authority. As this court has previously explained, an appellant’s “failure to provide us with any cogent analysis of his argument waives his claim on appeal.” (*Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 218; *People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1200 [“It is an established rule of appellate procedure that an appellant must present a factual analysis and legal authority on each point made or the argument may be deemed waived.”]; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 [“absence

of cogent legal argument or citation of authority allows this court to treat the contentions as waived”].)

But even if the assertion were not waived entirely, it fails. “A party moving for a new trial on the ground of newly discovered evidence must show that he could not, with reasonable diligence, have discovered or produced the evidence at the trial.” (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 730-731; Code Civ. Pro. § 657, subd. 4.) “Generally, a party seeking a new trial on this basis must show that ‘(1) the evidence is newly discovered; (2) *he or she exercised reasonable diligence in discovering and producing it*; and (3) it is material to the [] party’s case.’” (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1192, italics added.)

Here, defendants’ new trial motion was based on documents filed in a different litigation in 2009, which came to light as a result of the bankruptcy case filed by Prestwood. One of the few things our record establishes clearly is that defendants *were aware* of Prestwood’s bankruptcy, which was filed in December 2010. According to a minute order filed herein on May 23, 2011, one consequence of that bankruptcy was severance of a cross-complaint filed by defendants against Prestwood individually for purposes of trial.

However, defendants make no claim they paid even minimal attention to that bankruptcy case prior to trial herein or that they conducted even minimal discovery. Nor do they point to any evidence suggesting that had they done so, they would have nonetheless remained ignorant of the 2009 case or its alleged relevance to the claims asserted by Airparts herein.

Rather than making one of those expected claims, defendants simply rely on the novel assertion that they “should not be expected to spend money and time to do discovery in a case they know is baseless.” But that simply begs the question; one of the purposes of discovery is to investigate the merits of the opposing party’s claims. And of

course, we cannot accept the premise the case was baseless, since the trial court found to the contrary. “[T]he trial court’s judgment is presumptively correct, such that error must be affirmatively demonstrated, and where the record is silent the reviewing court will indulge all reasonable inferences in support of the judgment” (*Yield Dynamics, Inc., v. Tea Systems Corp.* (2007) 154 Cal.App.4th 547, 556-557.)

By their own admission, defendants simply made a strategic decision not to conduct pre-trial discovery or to offer any evidence at trial. While that decision apparently offered some immediate financial benefit, it also carried some risks. One obvious risk is that it will almost certainly render more difficult any post-trial effort to convince the judge that defendants’ earlier failure to discover relevant evidence did not stem from a lack of diligence. Another is that it becomes nearly impossible to convince an appellate court that the trial court abused its discretion by rejecting such a claim.

DISPOSITION

The judgment is affirmed. Airparts is to recover its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.