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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MD-7 US GROUP, INC., et al.,

Plaintiffs and Appellants,

v.

TAI LAM et al.,

Defendants and Appellants.

G048994

(Super. Ct. No. 30-2011-00473529)

O P I N I O N

Appeals from a judgment and order of the Superior Court of Orange County, Richard Luesebrink, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Appeal from order affirmed; appeal from judgment dismissed.

Grant, Genovese & Baratta and Lance D. Orloff for Plaintiffs and Appellants.

Gilbert & Nguyen and Jonathan T. Nguyen for Defendants and Appellants.

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I. INTRODUCTION

This is an appeal from an order granting a new trial. Such orders are tested under an abuse of discretion standard, and are almost always affirmed. (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 751 (*Fountain Valley Chateau*) [noting new trial orders are “infrequently reversed”].) This case is no exception.

II. FACTS

In 2010, two sets of parties came to *some* sort of business arrangement involving skin care products from Thailand. We will call those parties the “MD-7 Group” or sometimes just “MD-7” on the one hand, and the “Lam Group,” or sometimes just “Lam” on the other. According to the MD-7 Group, Lam defrauded members of the MD-7 Group into investing more than a \$1 million in a line of Thai skin care products under the false pretense that Lam had put \$300,000 of his own money into buying the rights to sell the products in California. Lam had also allegedly falsely claimed the skin care products were backed by a large, financially-sound corporation in Thailand (with some mysterious “big boss” behind it) which was on the verge of going into the American market and revolutionizing the market in skin care products for the Asian-American community. Further, based on Lam’s supposed purchase of the right to sell the products in California, the shareholders of MD-7 acquiesced in Lam’s becoming a shareholder in MD-7, albeit the shares would be held by Lam’s wife, Thu Chau. The idea was that Lam was being given credit for the \$300,000 he had already given the big boss in Thailand. The deal unraveled in 2011 when members of the MD-7 Group discovered there was no big boss corporation behind the skin care line. Rather, the product was coming from a do-it-yourself independent Thai laboratory, Milott Laboratories, that simply takes ideas for chemical products and manufactures them. Making matters worse, the MD-7 Group learned Lam had charged \$616,000 for an order of skin care products that had only cost Lam \$115,000 from Milott.

Lam's side of the story is a bit different. In 2010, the Lam Group agreed with members of the MD-7 Group to form the MD-7 corporation to sell Thai-produced cosmetics under the MD-7 trademark. But, according to Lam, the Lam Group was only responsible for 15 percent of the needed funds, 85 percent had to come from members of the MD-7 Group. In turn, MD-7 agreed to market cosmetics coming from a Lam-owned entity, La Caviar, itself a Nevada corporation. Under this distribution arrangement, the Lam Group would advance funds necessary to place an order with Milott Laboratories, and the MD-7 Group would be responsible to reimburse the Lam group its 50 percent share. However, the MD-7 Group failed to pay for cosmetics they ordered, tried to obtain product from Milott directly, sold products outside California (which they didn't have the right to do) and undercut other product distributors by selling for 50 percent off.

The upshot of these two competing versions of events was a complaint filed by the MD-7 Group, initially with 15 causes of action (including anti-trust claims) and a cross-complaint filed by the Lam Group (including trademark infringement claims). The case was originally assigned to Judge Geoffrey Glass, but was then assigned to a retired judge (Richard Luesebrink) when Judge Glass was assigned to trial in another case. Judge Luesebrink noted the case had arrived "with a five or six day time estimate" plus a demand for a jury trial, but without the issues conference required by rule 317 of the Orange County Superior Court.¹

On May 2, 2013, the first day the case was called, the trial judge asked if the parties' time estimate was still six days. MD-7's attorneys said they needed three to four days and Lam's attorney said he would need no more than two. The estimates seemed optimistic to the trial judge, who immediately warned them they'd be held to their estimates. On the absence of an issues conference, MD-7's counsel argued that all

¹ Orange County Superior Court local rule 317 provides in part: "An issue conference is required in all cases at least 10 days prior to the date set for trial, at which time the *parties are to meet and confer and execute necessary documents as listed below. Plaintiff* or petitioner must arrange the issue conference at a mutually agreeable time and location." (Italics added.)

the work that might have been done in an issue conference could be accomplished by a series of motions in limine. The idea was not welcomed. Judge Luesebrink quoted the late Justice Gardner: “He’d just say, ‘No, I’m not going to go through all that crap. Make your objections during the trial.’” The court then ordered the attorneys to work that night to create a statement of the case and to start going through the more than 700 exhibits. Judge Luesebrink would end up continually prodding the lawyers throughout the trial to do work at night that should have been done at an issues conference before trial.

As trial got under way, things began slowly. Jury voir dire took more time than expected because, as the trial judge noted, the lawyers had focused on semi-relevant minutiae such as “talking to jurors about what’s the difference between an invoice and credit” The pattern continued with the first opening statement. MD-7’s counsel had given a 30-minute estimate, but needed additional time to finish. And it continued the next day when proceedings got bogged down on what should have been a discovery matter, namely whether the 2013 tax returns for Lam’s La Caviar entity had been produced. Then the examination of Tony Cao, a principal in MD-7, took longer than expected, so, by May 7, the third day of trial, counsel for the Lam Group asked for two extra days of trial the following week. He might as well have been *Oliver Twist*.²

By the end of the morning session the judge had come to the conclusion that a six-day time estimate for fifteen causes of action and twenty in the cross-complaint was “inadequate on the face of it.” And not surprisingly, on the fourth day, May 8, 2013, even MD-7’s counsel expressed some worry over the remaining time and needed to go beyond his allotted time.

² As shown by this dialog:
“The Court: You’re asking for two days, Monday and Tuesday.
“Mr. Nguyen: Right.
“The Court: No.
“Mr. Nguyen: No, I don’t get two days?
“The Court: You get from Wednesday at noon to Friday at noon.”

Because the case involved both a complaint and a cross-complaint, the format for closing arguments became a matter of some confusion. Initially, the court established the protocol of MD-7 going first on its complaint, then Lam Group on the complaint *and* cross-complaint, then MD-7 on the cross-complaint, finishing up with a rebuttal by Lam Group counsel. But it didn't happen that way. Counsel for the MD-7 Group went first, arguing on his complaint. And Lam Group's counsel responded to the complaint. But by then it was Friday afternoon and the court had run out of time. Lam Group's counsel finished his argument that day by saying, "I will reserve my time for the second part when I present my case. Thank you." By "my case" he was obviously referring to the argument on his client's own cross-complaint.

Perhaps the court did not hear those last two sentences. The trial judge immediately summed things up this way: "Okay, ladies and gentlemen, so far we've heard the plaintiffs' opening argument on the complaint, the defendants' response to the opening argument on the complaint, and the cross-complainant's opening argument on the cross-complaint. We've run out of time today. We have to leave." The court thought counsel had concluded.

And then, on Monday morning, instead of counsel for the Lam Group being called to *complete* his argument on the cross-complaint, the judge called counsel for MD-7 Group, who immediately said he had nothing to rebut vis-à-vis Lam Group's cross-complaint and claimed he was "sandbagged" because Lam Group's counsel hadn't addressed the cross-complaint. Lam Group's counsel told the court he still hadn't done his closing, but the trial court was under the impression he had completely finished Friday. The conversation devolved into an inquiry into who said what on Friday, the end result being that the trial judge maintained his thought that Lam Group's counsel had completely finished, and the matter could now go to the jury.

And what went to the jury was considerable. The judge read 91 pages of jury instructions over two hours, and the written instructions contained a number of hard-

to-read pi and delta symbols. In fact, the judge mentioned that if the jury needed an interpreter to figure out the symbols they should let the court know. On top of that the jury got a 34-page, 147-question verdict form.

One day's deliberation resulted in an unqualified win for the MD-7 of \$1.351 million. The jury broke down the damages into three major categories: (1) five sets of fraud damages, each for exactly \$176,000, awarded to three different MD-7 Group entities (two to MD-7, two to Julie Bui, one to Tony Cao) from two sets of Lam Group entities (two from Hi Corporation and three from Tony Lam), for a total of \$880,000; (2) two sets of Cartwright Act damages for exactly \$143,000 from two Lam Group entities (Hi Corporation and Tony Lam) both to MD-7 itself, for a total of \$286,000; and (3) one set of damages for breach of fiduciary duty for \$185,000 against one Lam Group entity (Thu Chau) in favor of MD-7 itself, so the total amounted to \$1.351 million. (\$880,000 plus \$286,000 plus \$185,000 equals \$1.351 million.)

The court considered the three categories to be made up of duplicate damages, so the judgment, when it was eventually entered, would be for only one amount in each category, for a total of \$504,000. (\$176,000 plus \$143,000 plus \$185,000 equals \$504,000.) The actual judgment was filed June 18. Notice of entry of that judgment followed on June 24. Then, on July 2, the Lam Group filed a new trial motion.

The new trial motion was granted on August 7, based on the unreasonable compression of trial time. The judge summed up his decision this way: "We still have two Bekins boxes of exhibits, and we had a short time estimate for a case as complicated or convoluted as this. So I think in fairness to both sides, plus the confusion surrounding [Lam Group's trial counsel's] closing argument, it would be a whole new trial." In a discussion with MD-7's counsel, the trial judge elaborated on the original sin of not having a rule 317 issue conference, so "we ended up with five binders, or six binders" of exhibits and instructions being written even as other instructions were being read to the jury. MD-7's counsel made the excuse "we tried" to conduct an issue conference, but the

judge noted MD-7 had not availed itself of the opportunity to go to court and compel one, and that, under the rule, the initiative lies with the plaintiff to conduct the conference. The formal order granting the new trial was filed August 16, 2013.

On September 12, 2013, MD-7 filed a notice of appeal from both the new trial order and the earlier judgment. On October 2, 2013, the Lam Group filed a protective cross-appeal from the judgment.

III. DISCUSSION

A. *Preliminary Matters*

MD-7 has appealed from both the order granting the new trial and the judgment filed July 18 – the latter being of course precautionary. The basis for the appeal from the ostensibly favorable judgment was that it wasn't favorable enough. The judgment was for a total of \$504,000, but the jury's verdict totaled \$1.351 million. MD-7 argues the record is insufficient to show the \$1.351 million included duplicate damages.

There is no question, of course, that the appeal from the new trial order is timely, since it was filed less than a month after the new trial order. But Lam Group argues the appeal from the judgment is untimely because it was filed on September 12, more than 60 days after the service of the June 24 notice of entry of judgment. Lam Group has brought a motion in this court to dismiss that part of MD-7 Group's appeal.

The motion must be denied. Rule 8.108(g)(2) of the California Rules of Court provides that parties aggrieved by a new trial order but who also want to contest the insufficiency of their win in the judgment have 20 days from notice of a timely appeal from the new trial order. As stated in the Rutter Group appellate treatise: "Timely filing of a notice of appeal from an order granting a new trial . . . extends the time to file a protective cross-appeal for 20 days after the superior court clerk serves notification of the appeal (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2014) ¶ 3:172, p. 3-76.)

Another preliminary matter is that MD-7 has moved to strike Lam’s reply brief filed December 4 on the theory that, as *respondents*, the Lam Group needs prior authorization to file a *reply to a reply* – a ‘sur-reply’ as it were – and did not obtain it.³ MD-7’s theory is that a few parts of the December 4 reply brief sneak in arguments upholding the merits of the new trial order when Lam should have confined itself to just MD-7’s cross-appeal.

MD-7’s motion to strike is denied. We “simply disregard the offending contentions.” (See *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 180.)

B. *Merits of the New Trial Order*

A new trial order is about the hardest trial court order to overturn. Even MD-7 Group concedes the standard of review is abuse of discretion and it is a difficult standard to overcome. (See *Mercer v. Perez* (1968) 68 Cal.2d 104, 112; *Fountain Valley Chateau, supra*, 67 Cal.App.4th at p. 751 [“A new trial motion allows a judge to disbelieve witnesses, reweigh evidence and draw reasonable inferences contrary to that of the jury, and still, on appeal, retain a presumption of correctness that will be disturbed only upon a showing of manifest and unmistakable abuse.”].)

In the case before us, the confusion brought on by the need to rush closing arguments and the ensuing misunderstanding as to whether Lam Group’s counsel had finished *all* his closing argument would be enough to support a new trial order. And the mix-up in closing argument was compounded by Lam Group’s fundamental inability to present its full defense. Lam Group originally wanted to call 10 witnesses, but instead had to pare it down to only 4 because of the cramped time allotted, so we cannot say that

³ Just to recount what we have: MD-7 filed an opening brief on May 8, 2014. Lam filed a “Combined Respondent Brief and Cross-Appeal Opening Brief” on July 25, 2014. Then MD-7 filed a “Reply and Cross-Respondents’ Brief” on November 14, 2014, and, lastly Lam filed a “Reply Brief” – apparently replying to MD-7’s cross-respondent’s brief – on December 4, 2014.

Lam Group got to call all the witnesses it might have called had it the time. Certainly we are in no position to second-guess the trial court on that point.

MD-7 posits there was no prejudice because the jury was inclined to disbelieve Lam himself anyway. The theory holds no water. We don't *know* what the jury would have concluded if Lam Group had been allowed sufficient time to put on its full defense. (See *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 291 [reversing where trial court had unfairly cut off “any opportunity for rebuttal evidence” or “argument of counsel”]; *Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672 [abuse of discretion to declare mistrial because parties could not fit trial into “arbitrary” two-day deadline].) Neither did the trial judge, but he was in a far better position to judge that than we are. In the final analysis, the trial judge made a reasonable call that we can find no fault with.

IV. DISPOSITION

The new trial order is affirmed. MD-7's appeal from the judgment is therefore dismissed as moot. (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 60.) Lam Group's protective cross-appeal is likewise dismissed as moot. In the interests of justice each side will bear its own costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.