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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

JSA DEPOT, INC., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

FOREVERLAWN, INC.,

Real Party in Interest.

COURT OF APPEAL-4TH DIST DIV 3
FILED

APR 19 2013

Deputy Clerk _____

G047288

(Super. Ct. No. 07CC06601)

OPINION

Original proceedings; petition for a writ of prohibition to challenge an order of the Superior Court of Orange County, Francisco F. Firmat, Judge. Petition for a writ of prohibition is granted in part and denied in part.

Gaston & Gaston and Matthew J. Faust for Petitioners.

No appearance for Respondent.

Buchalter Nemer, Robert M. Dato and Kalley R. Aman for Real Party in Interest.

* * *

In a prior appeal, this court reversed a \$987,000 judgment in favor of two of the petitioners¹ because there was insufficient evidence to support the damages awarded. (See *JSA Depot, Inc. v. Foreverlawn Inc.* (Aug. 31, 2011, G044164) [nonpub. opn.] (*JSA Depot I.*) Our disposition stated, “The judgment is reversed. No argument having been made on appeal regarding liability, the matter is remanded for a new trial on the amount of damages only.” (*Ibid.*)

On remand, the trial court entertained various motions by the parties and eventually issued two pertinent rulings. First, the court granted respondent Foreverlawn, Inc.’s (Foreverlawn) motion to “reinstate” its cross-complaint, which had been voluntarily dismissed by Foreverlawn in the course of the first trial. Second, in response to a motion in limine pertaining to the scope of the retrial, the court ruled it would “allow evidence of liability sufficient to tie to damages in the 8 defined categories [of alleged breaches of contract]. The special verdict shall ask the jury in which of 8 ways the conduct of defendant caused damages.” The court set trial for August 27, 2012.

In an August 20, 2012 petition for writ of prohibition and/or other appropriate relief, petitioners challenged both aspects of the court’s order. We issued an alternative writ and order to show cause, and now grant the petition in part and deny in part. The court clearly exceeded its jurisdiction upon remand by allowing Foreverlawn to “reinstate” its cross-complaint. Thus, we issue a writ of prohibition restraining the court from conducting a trial in this action on Foreverlawn’s cross-complaint.

¹ Petitioners include the plaintiffs and corporate cross-defendants in the underlying lawsuit, JSA Depot, Inc. (JSA), and Foreverlawn of Southern California, Inc. (FSC), as well as two individual cross-defendants in the same action, Matthew Mighell and Diana Mighell.

We decline to provide relief as to the portion of the court's pretrial order pertaining to the scope of admissible evidence at trial. Construed fairly, the court's order and accompanying oral comments at various pretrial hearings merely suggest that a fair trial on damages in this case necessarily involves the introduction of evidence relevant to causation. The order does not indicate the court intends to allow the question of breach to be retried.

FACTS

In December 2005, Foreverlawn and JSA entered into a contract pursuant to which Foreverlawn "granted an exclusive license to JSA to sell its turf in several counties in California and Nevada." (*JSA Depot I, supra*, G044164.) JSA and FSC sought damages at trial pursuant to several causes of action, including breach of contract, breach of the implied covenant of good faith and fair dealing, and interference with contract/prospective economic advantage. (*Ibid.*) In the jury instructions presented at the first trial, the jury was apprised of eight ways (some of which overlap) in which Foreverlawn was alleged to have breached the contract between JSA and Foreverlawn. To wit, JSA alleged Foreverlawn breached the contract by (1) failing to timely deliver prepaid orders of turf, (2) failing to deliver turf of sufficient quality, (3) improperly altering JSA's exclusive territory, (4) selling turf directly to JSA's subdealers and other customers within JSA's territory, (5) selling turf directly to certain national accounts within JSA's territory, (6) entering into exclusive dealership agreements with other entities within JSA's territory, (7) failing to deliver sales leads to JSA on a timely basis, and (8) misrepresenting material facts to JSA during the negotiation and execution of the contract.

The jury found Foreverlawn liable to JSA and FSC in the combined amount (after a posttrial elimination of \$109,000 in duplicative damages by the trial court) of

\$987,000. (*JSA Depot I, supra*, G044164.) This total consisted of the following categories: \$109,000 to JSA for breach of contract; \$31,000 to JSA for interference with contractual relations; \$926,000 to JSA for breach of the implied covenant of good faith and fair dealing (\$109,000 for past economic loss and \$817,000 for other economic loss, including loss after termination of the contract); and \$30,000 to FSC for interference with prospective economic advantage. (*Ibid.*) We noted in our prior opinion that “Foreverlawn does not dispute it breached the express and implied terms of its contract with JSA, interfered with JSA’s contracts with its subdealers, and interfered with FSC’s potential economic relations.” (*Ibid.*) But we concluded there was no substantial evidence to support the damages awarded and remanded for a trial as to damages only. (*Ibid.*)

On remand, Foreverlawn moved to reinstate its cross-complaint. The cross-complaint is not mentioned in our prior opinion. Foreverlawn dismissed its cross-complaint during the original trial on the condition plaintiffs not call additional witnesses. Apparently, no signed order of dismissal was filed in the action with regard to the cross-complaint. The court granted the motion to “reinstate” Foreverlawn’s cross-complaint. The court analyzed the issue in terms of the parties’ intent, explaining at the hearing on the motion that Foreverlawn’s “stipulation [at the first trial] was we will dismiss our cross-complaint if no other witnesses are presented. But if any other witnesses are presented, then the deal is off. [¶] So the case gets tried It gets reversed. We get a partial trial, retrial, you’re going to put on more witnesses. And based on the weird language of this stipulation, your deal is your deal. If you’re going to call witnesses, the cross-complaint gets [reinstated].” The court did not discuss its own jurisdiction to reinstate and thereafter hold a trial on Foreverlawn’s cross-complaint.

JSA and FSC filed a motion in limine to determine the scope of the trial. JSA and FSC explained that they expected Foreverlawn to “attempt to introduce evidence that it did not breach the contract at issue. Because the matter of breach has already been

resolved in [petitioners'] favor (at both the trial and appellate levels), the Court should limit the proceedings so that the jury is not presented with conflicting evidence on liability." On May 16, 2012, the court ruled in a minute order that it would "allow evidence of liability sufficient to tie to damages in the 8 defined categories [of alleged breaches of contract]. The special verdict shall ask the jury in which of 8 ways the conduct of defendant caused damages." The court did not address the issue of the scope of the trial at the May hearing, other than to comment on a potential special verdict form. "[W]e're going to have to have a special verdict form. And the special verdict form is going to have to address those eight categories. So put on your thinking hats between now and then because we want to make sure we get this right." Counsel for petitioners objected that he was "going to request a general verdict, but today is not the time or place to discuss verdict forms."

In a prior March 2012 hearing, the court had explicated its thinking on the issue of the scope of the trial: "[T]his is a matter that has been tried before, and the Court of Appeal, reading at page 5 of its decision, it says that the jury has found that Foreverlawn breached its contract with JSA. Foreverlawn interfered with JSA's contractual relations. Foreverlawn interfered with the contract relations of FSC. And Foreverlawn negligently interfered with the prospective economic relationships of FSC. [¶] The Court of Appeal also found that Foreverlawn breached the implied covenant, and based on those findings, damages have been awarded by the jury. The Court of Appeal found that the damages were speculative and threw out completely the award for damages but left the findings of liability in place. [¶] Now, with regards to the breach of contract, the jury was presented eight ways in which [Foreverlawn] breached the contract. The jury does not tell us which of the eight ways there was a breach of contract. In order for the jury to calculate damages, the jury needs to hear the eight ways in which [Foreverlawn] breached the contract. And it may be that the original jury found that there was only one way or two ways or three or four, or all eight ways. Since we don't know, I

cannot instruct the jury there has been a breach of contract in eight ways, you're to award damages in all eight ways that there was a breach of contract, because it could have been one or eight. [¶] The only thing I think I can do is tell the jury this matter was tried once before, the jury found a breach of contract, and . . . the case needs to be tried. You will know this: there was a breach of contract by the defense [There are] eight ways in which damages are potentially possible, and we don't know which ones the jury found in the first trial, so you will hear all of that evidence again so that you can make your own determination as to what damages are for whatever breach of contract occurred."

DISCUSSION

"The reviewing court may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. [Citations.] The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned. [Citations.] [¶] 'The effect of an unqualified reversal . . . is to vacate the judgment, and to leave the case "at large" for further proceedings as if it had never been tried, and as if no judgment had ever been rendered. [Citations.]' [Citations.] Generally, an unqualified reversal has the effect of remanding the case for a new trial on all the issues presented by the pleadings [citation] and the parties have the right to file amended pleadings before a retrial [citation]." (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1499-1500.)

"When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void. [Citations.] When, for example, 'a cause is remanded with directions to enter a particular judgment, it is the duty of the trial court to enter judgment in conformity with the order of

the appellate court, and that order is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.” (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982 [when instructed to enter new default judgment based on evidence presented at default prove-up hearing, trial court erred by granting motion for reconsideration by defendant as to striking the answer and entering default]; see also *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701-702 [trial court may not reopen case after unqualified affirmance by appellate courts].)

“According to the California Supreme Court, the rule requiring a trial court to follow the terms of the remittitur is *jurisdictional*, unlike the law of the case doctrine. [Citations.] Therefore, whether the trial court believed our decision was right or wrong . . . it was bound to follow the remittitur.” (*People v. Dutra* (2006) 145 Cal.App.4th 1359, 1367.) “Prohibition is a proper remedy to restrain a trial court from proceeding to trial in violation of the terms of a final judgment of the reviewing court.” (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 656 (*Hampton*); see Code Civ. Proc., § 1102.)

In the prior appeal, this court reversed the judgment but remanded for a limited trial as to damages only. “Three factors of importance in assessing the choice of limited new trial as opposed to entire new trial are: (1) whether liability was clearly established at the first trial[;] (2) whether the evidence concerning damages was insufficient or entirely nonexistent; and (3) whether prejudice to a party would result as a result of the choice of one disposition over the other.” (*Tan Jay Internat., Ltd. v. Canadian Indemnity Co.* (1988) 198 Cal.App.3d 695, 705.) If a trial solely as to damages was unworkable, the method of challenging our disposition of the prior appeal was to make such concerns clear in the appellate briefing or to file a petition for rehearing at this

court, not to ask the trial court to “add thereto conditions which it assumes the reviewing court should have included.” (*Hampton, supra*, 38 Cal.2d at p. 656.)

A recent case reaffirmed these general principles and applied them to a situation in which the remittitur had limited the trial court to a retrial of damages issues. (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 853-854 (*Ayyad*).) In *Ayyad*, the initial class action trial resulted in a jury determination that the defendant owed \$73,775,975 in restitution to plaintiffs (cell phone customers) based on the payment of unenforceable penalties for early termination, and a simultaneous jury determination that the defendant suffered offsetting damages of \$225,697,433 based on plaintiffs’ early termination of their contracts. (*Id.* at pp. 855-856.) The trial court ultimately granted a new trial on the question of defendant’s damages. (*Id.* at p. 856.) On appeal, the appellate court affirmed the trial court “in all respects” (*ibid.*) and explicitly “remanded for retrial on the issue of [defendant’s] damages, and the calculation of any offset to which [defendant] may be entitled” (*id.* at p. 857). On remand, defendant moved to compel arbitration. (*Id.* at pp. 857-858.) The trial court determined it lacked jurisdiction to hear the motion and the appellate court affirmed. (*Id.* at pp. 858, 864.) “If an order grants a new trial as to a single issue, ‘it opens for examination all of the facts and circumstances relative to that one issue and as to other issues there shall be no retrial or examination of the facts.’” (*Id.* at p. 861.) “By refusing to consider [defendant’s] motion to compel arbitration, the trial court did no more than comply scrupulously with our remand directions. It therefore did not err.” (*Id.* at p. 862.) “The lower court has jurisdiction to consider *only* those issues specified in our disposition. That we did not expressly comment on the issue of arbitration does not render that fundamental rule inapplicable.” (*Id.* at p. 863.)

Applying these rules to the instant case, it is clear the trial court exceeded its jurisdiction by authorizing Foreverlawn to “reinstate” its cross-complaint, thereby expanding the scope of retrial beyond the question of JSA’s and FSC’s damages. This

court did not consider the question of whether the cross-complaint could be reinstated in our prior opinion. But as made clear by *Ayyad, supra*, 210 Cal.App.4th at page 863, the omission of Foreverlawn's cross-complaint in our prior opinion cuts against Foreverlawn's position. Indeed, to the extent the cross-complaint functioned as a mirror image of the allegations made by JSA and FSC (e.g., it was petitioners who breached the contract and committed torts, not Foreverlawn), the cross-complaint calls into question the very premise of Foreverlawn's liability. The question of whether a signed dismissal of the cross-complaint (Code Civ. Proc., § 581d) was ever entered is a red herring. We are not concerned here with whether the dismissal of the cross-complaint was an appealable judgment or whether the dismissal was made with prejudice to Foreverlawn raising the same claims in a different action.

A more interesting question is presented by the court's ruling to "allow evidence of liability sufficient to tie to damages in the 8 defined categories [of alleged breaches of contract]. The special verdict shall ask the jury in which of 8 ways the conduct of defendant caused damages." In a broad sense, the court's order is obviously right. To establish the amount of damages under contract or tort theories of recovery, a factfinder must decide whether the "detriment" proven by the plaintiff was "proximately caused" by the "breach of an obligation." (Civ. Code, §§ 3300 ["For the breach of an obligation arising from contract, the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom"], 3333 ["For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby".]) The jury's role in a damages retrial cannot be limited to merely tallying up whatever economic losses are proven without regard to whether such losses were caused by the defendant's breach(es). (See *Gararden v. Olinger* (1960) 177 Cal.App.2d 309, 311 ["in granting the retrial as to damages, the court did not curtail its power to determine . . . the

causal connection between defendants' acts and damages"'].) For instance, imagine a JSA witness testifies that JSA lost a contract with regard to a particular customer that would have netted \$20,000 in profit. The jury's task would not end with deciding whether it believed this testimony. Other evidence would be needed to provide a causal link between the \$20,000 loss to actions or omissions by Foreverlawn, and Foreverlawn would not be foreclosed from introducing evidence tending to sever the causal link.

Under this benign interpretation of the court's order, the court might have simply said it would follow the Evidence Code in conducting the retrial on damages. "Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) "'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) In business litigation like that presented here, with an extended temporal relationship between the parties and multiple breaches of contract under consideration, the same evidence is often relevant to breach, causation, and damages. Petitioners cannot really expect (as they state in their traverse) the trial court "to exclude from the retrial evidence relating to the issue of liability." The proper framework for addressing the admissibility of evidence at a trial on damages is to permit the presentation of evidence that is relevant to the question of damages, not to exclude evidence that is relevant to the question of breach.

JSA interprets the court's order and antecedent oral comments as suggesting Foreverlawn will be allowed to retry "liability" (or, more accurately, breach). The court certainly did not suggest the verdict form will ask the jury whether Foreverlawn breached its contract or tortiously interfered with the plaintiffs' contracts/prospective advantages. JSA's fears are not entirely misplaced, as there is a theoretical danger of the damages trial devolving into a retrial of the question of breach. But we see no reason to issue a writ of mandate ordering the court to follow the Evidence Code in conducting the trial.

DISPOSITION

Let a writ of prohibition issue precluding the trial court from “reinstating” Foreverlawn’s cross-complaint. The trial court does not have jurisdiction over claims made by Foreverlawn in its cross-complaint and the court is therefore precluded from including such claims in the limited trial we have previously ordered. The alternative writ is discharged. In the interests of justice, each party shall bear their own costs.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.

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