

Not Reported in Cal.Rptr.3d, 2005 WL 2822392 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2005 WL 2822392 (Cal.App. 2 Dist.))



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Court of Appeal, Second District, Division 1, California.

O HILL PROPERTIES, Plaintiff and Appellant,
 v.

9441 WILSHIRE BLVD., L.P., et al., Defendants
 and Respondents.

No. B169328.

(Los Angeles County Super. Ct. No. SC064894).

Oct. 28, 2005.

APPEAL from a judgment of the Superior Court of Los Angeles County, Valerie Baker, Judge. Affirmed and remanded with directions.

Ranck & Schwartz and William B. Campbell; Paul, Hastings, Janofsky & Walker, Paul Grossman, Paul W. Cane, Jr., and Katherine C. Huibonhoa for Plaintiffs and Appellants.

Law Offices of Susan Harrison and Susan Harrison; Dunn Koes, Pamela E. Dunn and Daniel J. Koes for Defendants and Respondents.

VOGEL, J.

*1 This case arises out of a failed contract for the sale of real property. The buyer sued the seller and the case was tried to a jury, which returned special verdicts finding both parties had performed (or been excused from performance) and that the seller did not breach the contract's covenant of good faith and fair dealing. The buyer appeals, claiming the verdicts are inconsistent and challenging an award of attorneys' fees to the seller. We affirm.

FACTS

A.

In 1929, Louis B. Mayer built a seven-story building at the corner of Wilshire Boulevard and Beverly Drive in Beverly Hills, formerly the home of MGM studios and now known as 9441 Wilshire Boulevard. By 1986, the building was owned by Donald Sterling and the land was owned by David Adams, who leased the land to Sterling under a preexisting 99-year ground lease (which was entered on January 1, 1965, and expires on December 31, 2063).^{FN1} The ground lease obligated Sterling to pay Adams a base minimum rent, plus a percentage of the gross receipts received by Sterling from any subleases, and allowed Sterling to sublease any part of the building without Adams's consent. "From time to time," Adams suggested to Sterling that he ought to buy the land, but Sterling always declined and Adams ultimately decided to offer the land for sale through a broker for \$3.5 million.

FN1. Adams is the general partner of 9441 Wilshire Blvd., a limited partnership, and there are a number of related entities, all of which are included in our references to Adams.

On November 8, 2000, Robert O. Hill (through O Hill Properties, which is included in our references to O Hill) offered to purchase the land at Adams's asking price, and a preprinted standard purchase agreement was executed by O Hill and Adams that day. Among other contingencies set out in the agreement (physical inspection, permits and the like), Adams was obligated to give O Hill a seller's estoppel certificate and a copy of Sterling's lease, and to use his "best efforts" to obtain estoppel certificates signed by Sterling and his subtenants (which were important to O Hill because Adams had said Sterling was not meeting his percentage obligations under the ground lease).^{FN2} O Hill opened an escrow at Commerce Escrow Company and deposited \$150,000 into an escrow scheduled to close by December 22 (according to Adams) or 26 (according to O Hill).

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FN2. An estoppel certificate reveals the present intent and understanding of the parties to a commercial lease. (*Plaza Freeway Ltd. Partnership v. First Mountain Bank* (2000) 81 Cal.App.4th 616, 626.)

Adams and O Hill exchanged letters and documents during November and December, and talked about a number of issues, including title insurance, the terms of Sterling's ground lease, the possibility that back rent was owed by Sterling, the required estoppel certificates, and similar matters. Adams sent O Hill copies of a title insurance policy, the 1965 ground lease and an amendment to it, and a "Property Information Sheet" in which Adams said he had no knowledge of any physical defects or code violations. Adams also sent copies of his past correspondence with Sterling. O Hill asked for more information, and Adams responded. O Hill told Adams he had to know whether Sterling's lease was "in full force and effect."

Adams said he would sign a seller's estoppel certificate, and told O Hill he wanted escrow to close by December 15. O Hill said he would not be able to close until December 26, and told Adams there were a number of outstanding issues, including the estoppel certificates, the physical inspection, discrepancies about square footage, problems in the chain of title, and an assignment of Sterling's lease. Adams responded and said he would sign the seller's estoppel certificate (which he did on December 20). O Hill asked Adams for an assignment of Adams's right to collect back percentage rent from Sterling, and Adams agreed to the assignment.

*2 Adams told O Hill that time was of the essence because the sale of the land was part of a 1031 exchange. The next day (December 21), Commerce Escrow sent Sterling a tenant's estoppel certificate for his signature. On December 22, Commerce Escrow sent the title commitment to O Hill who, in turn, disapproved various sections of the commitment. The closing date came and went, and

(by mutual agreement) was extended so that the contingencies (including the estoppel certificates) could be satisfied. Sterling's lawyer asked for another copy of the tenant's estoppel certificate and told Commerce Escrow that Sterling was on vacation and would complete the form when he returned after the first of the year.

Another copy was sent to Sterling, then returned to Commerce unsigned, stating there were issues about Adams's obligation to participate in statutorily required modifications to the building. Attached to the unsigned estoppel certificate was a copy of a deed of trust for a \$150,000 line of credit and two subleases. On January 3, 2001, Commerce Escrow sent out a notice that there were no "outstanding items" for Adams to complete. On January 4, O Hill sent Adams a list of the items needed to close and urged Adams to obtain the required estoppel certificates from Sterling.

On January 9, Adams reminded Sterling's lawyer that he needed the tenant's estoppel certificate (and tried unsuccessfully to reach Sterling directly). On January 11, Adams made a list of the outstanding items that included the tenants' estoppel certificates (from both Sterling and his subtenants). On January 15, Adams executed an indemnity agreement prepared by O Hill, in which Adams agreed to indemnify O Hill from "all claims, losses, liabilities, damages, actions, causes of action, penalties, demands, costs and expenses, including reasonable attorneys' fees" and other costs arising "from any claim" by Sterling alleging that O Hill "has or is responsible for the removal of asbestos or for any cost of code compliance for the building."

On January 17, Adams's lawyer wrote to Sterling's lawyer, stating that "the escrow relative to the sale of [the land] is being held up for the lack of three items, all of which are in control of Mr. Donald Sterling. The escrow can close as soon as an estoppel is signed by Mr. Sterling as well as the leases...." The letter threatened legal action if Sterling did not comply. The same day, Adams wrote to Commerce Escrow to say the escrow was being

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held up by the missing estoppel certificates and subleases.

On January 18, Adams informed O Hill that he would make no further efforts to get a tenant's estoppel certificate from Sterling because Sterling would not cooperate (because Sterling did not want the sale to go through). Adams told O Hill to either wire the funds to close escrow, or to cancel the deal (in which event Adams would return O Hill's \$150,000 deposit).

B.

Meanwhile, Adams had been negotiating with Sterling and, on January 17, Adams had accepted a back-up offer from Sterling to purchase the land at the \$3.5 million asking price. On the same day, Sterling's lawyer wrote to Commerce Escrow, listing nine "disclosures" about problems with the property (building code violations, local ordinance violations, and agreements with the City of Beverly Hills limiting the uses of the building). According to O Hill, these disclosures changed the "use, occupancy, tenants, or conditions" of the property (affecting the percentage rent and other provisions) and thus triggered a 10-day period within which O Hill had the right to decide whether to proceed with the transaction.

*3 On January 19, Sterling opened a new escrow and deposited \$3.5 million. Adams then told O Hill that he had a full price and fully funded back-up offer from Sterling, that unless O Hill waived all outstanding contingencies and deposited the balance due under his contract that day, the O Hill contract would be cancelled and O Hill's \$150,000 deposit would be returned to him. In short, Adams took the position that the contingencies had been satisfied, and that he had used his best efforts to comply with the contract. O Hill, in turn, wrote to Adams to confirm Adams's "repudiation" of their deal.

On January 22, O Hill sued Adams for breach of contract and breach of the implied covenant of good faith and fair dealing.^{FN3} On the same day,

Sterling executed a purported estoppel certificate, stating he would not make any warranties about the status of his ground lease because it had been "modified" by laches and waiver. On January 26, O Hill wrote to Adams, listing several outstanding contingencies. Later that day, Adams wrote to O Hill, stating that he had "used his best efforts" to satisfy O Hill, and that the notice of cancellation of the escrow still stood.

FN3. O Hill also sued Sterling for interference with contractual relations, but Sterling and O Hill settled their dispute on the first or second day of trial and Sterling is not a party to this appeal.

On March 5, Adams and Sterling finalized their deal and the money deposited by Sterling was released to Adams.

C.

O Hill's action against Adams was tried to a jury during February and March 2003, at which time O Hill claimed that Adams had repudiated their deal on January 19, 2001, that Adams's repudiation was a material, anticipatory breach of the contract, and that Adams's repudiation excused O Hill's further performance so that O Hill did not have to tender the remainder of the purchase price (which O Hill insisted he was ready and able to do). For his part, Adams claimed he was at all times ready to close, that O Hill repeatedly raised "bogus" questions about the sale, and that it was O Hill who had breached the contract by his failure to tender the balance due, which occurred (according to Adams) because O Hill was unable to raise the money.

On March 14, the jury returned the following special verdicts:

"Question No. 1:

"There is a contract between the parties. Did [O Hill] perform under the contract, except to the extent [O Hill's] performance was excused?"

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“Answer ‘Yes’ or ‘No’: Yes. [The vote was 12 to 0.]

“Question No. 2:

“Did [O Hill] have the ability to perform?”

“Answer ‘Yes’ or ‘No’: Yes. [The vote was 12 to 0.]

“Question No. 3:

“Did [Adams] perform under the contract, except to the extent [Adams’s] performance was excused?”

“Answer ‘Yes’ or ‘No’: Yes. [The vote was 12 to 0.]

“Question No. 4:

“Did [Adams] breach the implied[] covenant of good faith and fair dealing?”

“Answer ‘Yes’ or ‘No’: No. [The vote was 11 to 1.]”

Based on these verdicts, the trial court entered judgment in favor of Adams, found Adams was the prevailing party, awarded him his costs and attorney’s fees, a total of \$524,405.58, and ordered Adams to return O Hill’s deposit (\$150,000) plus interest. O Hill appeals.

DISCUSSION

I.

*4 O Hill concedes that “[s]ometimes a contract can disappear by operation of law without breach by either side—e.g., mutual mistake—but [contends] that is not this case,” and that the verdicts must be viewed as inconsistent and irreconcilable. We disagree.

A.

Jurors may not make irreconcilably different determinations of fact based on the same evidence and, when they do, a motion for a new trial must be granted. (*Cavallero v. Michelin Tire Corp.* (1979)

96 Cal.App.3d 95, 101; *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344.) On appeal, the issue is one of law, subject to de novo review (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 303), but we cannot view the verdicts in the abstract and must instead consider them in the context of the pleadings, the evidence presented at trial, and the instructions given to the jury. (*Mixon v. Riverview Hospital* (1967) 254 Cal.App.2d 364, 375-376; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894; 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, §§ 375-379.)

B.

According to the verdicts, O Hill had the ability to perform and did perform except to the extent his performance was excused; Adams performed except to the extent his performance was excused; and Adams did not breach the covenant of good faith and fair dealing. We agree with O Hill that the jury’s finding that O Hill had the ability to perform necessarily means the jury rejected Adams’s contention that O Hill was unable to raise the money to complete the deal; we agree that the jury’s finding that O Hill performed except to the extent his performance was excused means that something Adams did or didn’t do excused O Hill’s further performance, which we agree means the jury found either (1) that Adams had the ability to but did not obtain the tenants’ estoppel certificates or (2) that Adams repudiated the contract by entering into and later completing the back-up deal with Sterling. But we do not agree that these three special verdicts are hopelessly inconsistent with each other or with the fourth special verdict—that Adams did not breach the covenant of good faith and fair dealing.

The jurors were instructed that O Hill was seeking damages for both breach of contract and breach of the covenant of good faith and fair dealing. With regard to the former, the jurors were told that “[a]n unexcused failure to perform a contract is a breach,” and that the elements of the claim were (1) the existence of a contract between the parties

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(which wasn't disputed), (2) O Hill's "performance, unless excused, (3) [Adams's] unexcused failure to perform," (4) O Hill's ability to perform, and (5) damages to O Hill caused by the breach. With regard to the breach of covenant cause of action, the jurors were instructed that the essential elements were the existence of a contract, performance by O Hill unless excused, conduct by Adams "that breached the implied covenant of good faith and fair dealing," and damages.

*5 More specifically, the jurors were instructed (at O Hill's request) that "[e]very contract contains an implied covenant of good faith and fair dealing. This means that neither party will do anything which would have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. In order to be found liable for breach of the implied covenant of good faith and fair dealing, [Adams's] conduct must demonstrate a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence, *but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party, thereby depriving that party of the benefits of the agreement.*" (Italics added.)

With the instructions in mind, it is plain that the jurors found that Adams indeed failed to perform (by failing to secure the tenant's estoppel certificates or by repudiating the contract), but that his performance was excused-or, more specifically, that his failure to perform did not constitute a breach of the covenant of good faith and fair dealing because Adams did not deliberately or unfairly frustrate the contract. In short, the "bad guy" was Sterling, not Adams, and Adams's "repudiation" (if that is what it was) was excused. (As the jurors were instructed, it is only an "unexcused repudiation" that constitutes an actual breach.)

So viewed, the verdicts are not inconsistent.

II.

We summarily reject O Hill's contention that Adams is not the prevailing party, an argument based on the fact that Adams had no net recovery. O Hill asked the jury to award a minimum of \$1.5 million in damages. The jury gave O Hill nothing, and the most that can be said is that the trial court ordered Adams to return O Hill's \$150,000 deposit (which return was conceded). By any definition, Adams was the prevailing party. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109 [to determine whether there is a prevailing party, the trial court must compare the relief awarded on the contract claims to the parties' demands on those claims]; *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1158.)

DISPOSITION

The judgment is affirmed. 9441 Wilshire Blvd., L.P. and David Adams are entitled to their costs of appeal, including attorney's fees, and the cause is remanded to the trial court with directions to determine the amount thereof.

We concur: SPENCER, P.J., and ROTHSCHILD, J.

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