

CERTIFIED FOR PARTIAL PUBLICATION*
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

BAY WORLD TRADING, LTD.,
Plaintiff and Respondent,
v.
NEBRASKA BEEF, INC.,
Defendant and Appellant.

A095036

(San Francisco County
Super. Ct. No. 997070)

Nebraska Beef, Inc. (Nebraska Beef) appeals from a judgment entered against it following the bench trial of a breach of contract action. Nebraska Beef claims: (1) the trial court abused its discretion in denying Nebraska Beef's request to reopen discovery or for a continuance of the trial; (2) insufficient evidence supports the findings on causation and damages; and (3) the court exceeded its authority when it amended the statement of decision to award prejudgment interest. We reject each of these arguments and affirm the judgment. In the published portion of the opinion, we hold that when the trial court seeks a waiver of the statutory requirements set forth in Code of Civil Procedure section 632 for preparing a statement of decision, the court must clearly explain the alternative procedure it proposes. If the alternative procedure will deprive the parties of their statutory rights to file objections, the record must disclose the express consent to surrender such rights.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part I and part II.

BACKGROUND

Nebraska Beef operates a slaughterhouse in Omaha, Nebraska, from which it produces meat products for human consumption. On July 2, 1996, Bay World Trading, Ltd. (Bay World), a distributor of meat products, entered into a contract with Nebraska Beef. Bay World agreed to purchase 12 “full container loads” of frozen beef tripe (weighing 45,000 pounds each) at a cost of 20 cents per pound, with shipment to begin in September. The purchase order noted this price reflected a discount of 5 cents per pound from a previous agreement. Later that month, Bay World arranged to sell four of these containers to Pekpol, a company located in Poland. When the shipment reached Poland in October or November of 1996, Polish inspectors rejected it due to spoilage of the meat. Bay World discarded three of the tripe containers in Poland and attempted to sell the remaining container to a customer in China, but the Chinese customer also rejected the meat due to spoilage.

Having satisfied itself that the spoilage did not occur due to temperature control problems in the railroad or shipping transport of the tripe, Bay World confronted Nebraska Beef about the problem and eventually sued Nebraska Beef for breach of contract, misrepresentation, breach of warranties and negligent performance of contract. After a bench trial, the court found Nebraska Beef’s improper processing was responsible for the spoilage of the tripe and awarded Bay World damages totaling close to \$125,000. The court later amended its statement of decision, upon motions from Bay World, to include an award of prejudgment interest.

DISCUSSION

I. No Abuse of Discretion in Pretrial Rulings

Nebraska Beef complains the court abused its discretion by refusing Nebraska Beef’s request, on the eve of trial, to reopen discovery and continue the trial date. Resolution of this claim requires a brief summary of the case’s procedural history.

After Bay World filed its complaint in August 1998, the case proceeded to a judicial arbitration, which resulted in an award to Bay World of \$85,000 plus costs of

suit. On June 22, 1999, Nebraska Beef rejected the arbitration award and requested a trial de novo. The case was first set for trial on December 6, 1999, but trial was continued to March 6, 2000 upon Nebraska Beef's motion. Although the court "reluctantly agreed" to postpone the trial date, it "stated on the record that there would be no more continuances." On March 3, 2000, the court permitted a stipulated continuance of the trial until March 10, 2000. Nebraska Beef sought this continuance due to the illness of its attorney. On March 10, 2000, Nebraska Beef did not appear for trial; therefore, the court heard abbreviated evidence from Bay World and entered a default judgment in Bay World's favor. Nebraska Beef later moved to set aside the default, saying its trial counsel had been hit by an automobile on the morning of the trial. Bay World stipulated to vacating the default, and the court set a new trial date of May 15, 2000.

In April 2000, Nebraska Beef obtained new counsel. Then, on May 9, 2000, Nebraska Beef's new attorney moved for a thirty-day continuance of the trial date, based on the recent substitution of counsel and the unavailability of an out-of-state witness.¹ The witness, Roger Davids, was a USDA inspector who inspected Nebraska Beef's meat products during the relevant time period. Nebraska Beef's new counsel claimed he only recently learned of the existence of Mr. Davids, and counsel believed his testimony would be crucial to Nebraska Beef's defense. Bay World opposed the continuance, arguing Nebraska Beef had not previously disclosed Mr. Davids in discovery as a potential expert or percipient witness. The court refused to grant the motion, noting Nebraska Beef's recent substitution of trial counsel was not sufficient to establish good cause for a continuance, and the unavailability of Mr. Davids was irrelevant because this witness had never been disclosed. Trial began on May 15, 2000; however, at the beginning of trial, Nebraska Beef moved to reopen discovery and asked the court to "[hold] open" evidence in the case for thirty days, to allow for presentation of the

¹ The motion also sought additional time to allow Nebraska Beef's new counsel to depose Bay World's expert witnesses. On appeal, Nebraska Beef does not claim this ground would have been sufficient to justify a continuance.

videotaped deposition of Mr. Davids. The court encouraged the parties to reach a stipulation on this issue, but ultimately denied the motion.

While recognizing our review of these decisions is “highly deferential,” Nebraska Beef claims the trial court abused its discretion in refusing to allow a continuance or reopened discovery. On the issue of discovery, Nebraska Beef argues the court never exercised its discretion by considering the merits of Nebraska Beef’s request, but simply denied the motion based on a stated “policy” against reopening discovery. However, the court did not base its ruling on a blind adherence to a policy. The court merely mentioned its general disinclination to reopen discovery “in the middle of trial” among other comments urging the parties to come to an agreement about the possible presentation of evidence from Mr. Davids. Indeed, shortly after the court observed “it’s not my policy to reopen discovery,” the court stressed, “I’m not going to be ruling on these things now.” When the court ultimately did rule that any evidence from Mr. Davids would be excluded, the decision was based on Nebraska Beef’s failure to disclose him as a witness and the absence of a sufficient showing to permit reopening of discovery. This decision was well within the trial court’s discretion. Code of Civil Procedure section 2024, subdivision (e) allows a court discretion to reopen discovery considering, among other things, the party’s diligence or lack of diligence in seeking the discovery and the likelihood that reopened discovery would interfere with the trial calendar or otherwise prejudice another party. Mr. Davids was known to Nebraska Beef, since he was an inspector at the Nebraska Beef facility, yet the company took no steps to disclose him or secure his testimony during the many months leading up to the postponed trial of this case. In addition, a decision to reopen discovery in the middle of trial—and to “hold open” the evidence to permit presentation of Mr. Davids’ videotaped deposition—would undoubtedly have delayed resolution of the case.

Nebraska Beef also challenges the denial of its final request for a continuance of the trial. Again, Nebraska Beef asserts the court refused to exercise its discretion, based on the court’s observation that the substitution of trial counsel was “not something which is sufficient for good cause.” However, once again Nebraska Beef’s argument rests upon

a statement taken out of context, whereas the record fully supports the court’s decision to deny the requested continuance. A continuance of trial “shall not be granted except on an affirmative showing of good cause. . . .” (Cal. Rules of Court, rule 375(a).) In general, a continuance should only be granted due to an “emergency . . . that could not have been anticipated or avoided with reasonable diligence” (Cal. Stds. Jud. Admin., § 9.) Nebraska Beef’s request rested upon the unavailability of Mr. Davids and the substitution of counsel. Even assuming Mr. Davids was a “witness,” since he had not been disclosed as such, the unavailability of a witness generally does not constitute good cause for a continuance unless “his absence is due to an unavoidable emergency that counsel did not and could not reasonably have known” at the time of trial setting. (Cal. Stds. Jud. Admin., § 9(3)(ii).) Nebraska Beef’s failure to procure the testimony of Mr. Davids was due, not to any such emergency, but rather to Nebraska Beef’s own lack of diligence in preparing for trial. Nor did the belated substitution of Nebraska Beef’s counsel necessitate a continuance, because the substitution of a trial attorney generally establishes good cause “only where there is an affirmative showing that the substitution is required in the interest of justice.” (Cal. Stds. Jud. Admin., § 9(4).) From the record before us, it appears Nebraska Beef simply changed its counsel and never attempted to make this required showing.

In short, the trial court did not abuse its discretion in refusing to reopen discovery or in denying Nebraska Beef’s request for a continuance, which represented the company’s fourth attempt to postpone the trial.

II. Substantial Evidence Supports Judgment

Nebraska Beef challenges the trial court’s findings on causation and damages. “When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court’s resolution of the factual issue is supported by substantial evidence, it must be affirmed. [Citation.]” (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

A. Causation

Nebraska Beef identifies several factual findings in the statement of decision relevant to the court's conclusion that Nebraska Beef was responsible for spoilage of the tripe. Many of these statements overlap, however. Essentially, the court found that, due to Nebraska Beef's failure to implement proper procedures and monitor production, the tripe was subjected to "thermal abuse," i.e., was not properly chilled, during its processing at Nebraska Beef. Tripe must be immediately chilled after it has been cleaned and scalded to prevent spoilage due to the growth of bacteria. The court found that, during the months when Bay World's tripe was produced, Nebraska Beef allowed some tripe to "warm up," and some racks of tripe were not promptly chilled. The court further noted, "Inspections determined that spoilage did not occur during transport, but rather during processing at [Nebraska Beef's] plant."

Nebraska Beef challenges these findings by citing evidence in its favor, such as testimony that Bay World regularly inspected samples of the tripe and did not detect a thermal abuse problem. However, as a reviewing court, we may not reverse due to lack of substantial evidence simply because evidence supporting a finding is not particularly strong, or is contradicted by other evidence. "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.* [Citations.]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874. Italics in original.)

The record contains substantial evidence to support the finding that Nebraska Beef was responsible for spoilage of the tripe. A vice president of Bay World testified that the company inspected several samples of Nebraska Beef tripe after the Polish authorities

rejected Bay World's shipment, and from these tests Bay World concluded Nebraska Beef had not followed procedures to ensure the tripe was sufficiently cooled before packaging. He also described his investigation of procedures used by the railroad and shipping lines, which led him to conclude the tripe had not been allowed to thaw during transit. In addition, a former Nebraska Beef plant manager testified that, during August 1996, meat products prepared for transportation to a deep freezing facility were sometimes exposed to high summer temperatures. On one occasion, a truckload of product was accidentally left overnight at Nebraska Beef, and not shipped immediately to the freezing facility. Finally, the court heard testimony that the spoilage of Bay World's tripe occurred in the center of packages and the packages showed no evidence of water damage due to defrosting, which suggested the spoilage happened before the product was blast frozen for shipping.

B. Damages

Nebraska Beef challenges the court's assessment of damages on two grounds. First, Nebraska Beef complains the court failed to decide a material issue, i.e., whether the parties had agreed to share the financial losses resulting from the spoiled tripe. This argument rests on a single sentence in a letter from a Bay World employee to Nebraska Beef, memorializing the companies' discussions in a meeting about the spoiled tripe. The letter stated the companies agreed "[t]hat whatever is done is done and that both Nebraska Beef and Bay World Trading would share financial responsibility for all product that was produced until December 12." Yet, in uncontradicted testimony at trial, Bay World's vice president denied the companies had any agreement to share the *costs* incurred due to spoilage of the tripe. Nebraska Beef now argues this conflicting evidence raised a material issue of fact, and the trial court's failure to address it in a specific finding requires reversal. We disagree. Nebraska Beef's belated reliance on this "material issue" is disingenuous given that the company did not plead the alleged cost-sharing agreement as an affirmative defense to Bay World's claims. But even assuming the letter was sufficient to raise a "material issue" regarding damage apportionment, the

court’s failure to include a specific finding does not warrant reversal. “[T]he omission to make such findings [on a material issue] is harmless error unless the evidence is sufficient to sustain a finding in the complaining party’s favor which would have the effect of countervailing or destroying other findings. [Citation.]” (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.) The only evidence of a cost-sharing agreement—a sentence in a letter—was strongly contradicted in trial testimony from Bay World’s principal witness.

Second, Nebraska Beef claims the court miscalculated contract damages because it awarded Bay World 25 cents per pound for the tripe, whereas the parties’ contract specified a price of 20 cents per pound. However, uncontroverted testimony from Bay World’s vice president established that, regardless of the anticipated discount of 5 cents stated in the original purchase order, Bay World in fact paid 25 cents per pound for the tripe in question. Thus, the court properly calculated damages based on the amount Bay World actually paid for the damaged product. In any event, Nebraska Beef waived this argument by failing to raise it in its motion for a new trial. (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918 [“ ‘The point that damages are excessive cannot be raised for the first time on appeal, but must be presented to the lower court on the motion for new trial’ ”].)²

III. Trial Court Had the Power to Correct the Statement of Decision

Finally, Nebraska Beef contends the trial court erred in amending its statement of decision to include prejudgment interest. Based on two procedural arguments,³ Nebraska

² Nebraska Beef’s motion did argue damages were excessive, but the argument was based on an asserted failure of proof of proximate causation and the alleged agreement to share costs.

³ Nebraska Beef raised no substantive argument on this issue in its opening brief on appeal, though it did dispute Bay World’s right to prejudgment interest in the reply brief. We decline to consider this belated argument. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 [“ ‘ “[P]oints raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before” ’ [Citations.]”].)

Beef claims the original statement of decision was “final” and the court had no power to change it before entry of judgment.

Near the end of the two-day trial, the court suggested a streamlined procedure for preparing the statement of decision. The court stated: “[W]hat I’m going to suggest is that each side prepare a proposed statement of decision. We will set a date when that would be due, and then the opposing party would have whatever number of days, say up to ten—shorter if you think you can do it—whereby you could send me an objection to the other side’s statement. And then we would forget the regular rules and statute, or you would waive the rules . . . and the statute on statements of decision. [¶] I would have both of your positions, your recognized opposition to the other side, and then I would be filing my statement of decision along with the proposed judgment to give you three days to just look it over as to form. And then the judgment would be filed. And this will condense the time. . . . [¶] And then once I get each of your oppositions, then I of course have 90 days.” The parties agreed to the court’s suggestion and accordingly submitted proposed findings and responsive briefs. Thereafter, apparently with no prior notice to the parties, the court filed a statement of decision, in which it awarded Bay World close to \$125,000 in damages but declined to award punitive damages or prejudgment interest.

What the court intended by its proposed alternative procedure under Code of Civil Procedure section 632 then became the subject of dispute. Fourteen days (ten court days) after the court filed its statement of decision, Bay World filed a motion requesting that prejudgment interest be included. Nebraska Beef objected to this motion as an improper attempt to amend the court’s final decision. Ultimately, after several briefs and hearings on the issue, the trial court issued an amendment to the statement of decision, awarding Bay World prejudgment simple interest totaling close to \$41,000. Three days later, the court entered a judgment in accordance with the statement of decision as amended.

Nebraska Beef first argues the court had no authority to amend its statement of decision because it was bound by the alternative procedure to which the parties stipulated. Code of Civil Procedure section 632 requires the court to issue a statement of decision “explaining the factual and legal basis for its decision as to each of the principal

controverted issues at trial” when a party requests such a written statement within 10 days after the court has announced a tentative decision. After a party submits such a request, specifying the controverted issues upon which written findings are requested, all parties have a right to submit proposals regarding the content of the statement of decision. (Code Civ. Proc., § 632.) In general, such proposals must be submitted to the court within ten days after a statement of decision is requested, and the court (or a party designated by the court) then has 15 days to prepare a proposed statement of decision and proposed judgment. (Cal. Rules of Court, rule 232(a)-(c).) Within 15 days after service of the proposed statement of decision and proposed judgment, the parties may file objections. (Cal. Rules of Court, rule 232(d).)

According to Nebraska Beef, the trial court’s request for proposed statements of decision after the trial essentially skipped over the statutory requirements that (1) the court announce a tentative decision, and (2) a party formally request a statement of decision. Then, because the court filed its statement of decision and proposed judgment after the parties presented objections to each other’s proposed statements and *did not* specify that the parties would have an opportunity to object to the court’s own statement, Nebraska Beef contends the court’s statement of decision was final, pursuant to the Code of Civil Procedure, and not subject to further amendment. Moreover, Nebraska Beef asserts, the parties stipulated to an alternative statement of decision procedure that did not permit either party to file objections to the court’s statement of decision.

If the trial court intended to abrogate the parties’ statutory rights to object to the court’s statement of decision, the court should have made this absolutely clear when it sought the parties’ approval of its proposed alternative procedure. The ability to submit a proposed statement of decision in advance is no substitute for an opportunity to object to the court’s own statement of decision: “Code of Civil Procedure section 634 and California Rules of Court, rule 232, taken together, clearly contemplate any defects in the trial court’s statement of decision must be brought to the court’s attention through specific objections to the statement itself, not through a proposed alternative statement of decision served prior to the court’s issuance of its own statement. By filing specific

objections to the court’s statement of decision a party pinpoints alleged deficiencies in the statement and allows the court to focus on facts or issues the party contends were not resolved or whose resolution is ambiguous. A proposed alternative statement of decision . . . does not serve these functions and does not satisfy the requirements of Code of Civil Procedure section 634 and California Rules of Court, rule 232.” (*Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380.)

The trial court here did not clearly state that the parties would be precluded from submitting objections to the court’s statement of decision.⁴ To the contrary, the court stated the parties would have three days to “look over” the statement of decision and proposed judgment “as to form”; thus, Bay World may have reasonably concluded the alternative procedure to which it had agreed did not preclude it from objecting to the absence of prejudgment interest in the court’s decision. The parties’ stipulation did not expressly preclude such an objection, and the trial court did not err in considering it.⁵ Moreover, Nebraska Beef suffered no prejudice because it had a full opportunity to address the merits of Bay World’s claim to prejudgment interest and did so in numerous briefs.

Nor did the court err when it ultimately decided to amend its statement of decision. Relying on Code of Civil Procedure section 664, Nebraska Beef insists the clerk of the court was statutorily required to enter judgment immediately upon the court’s filing of its statement of decision. This argument, of course, begs the question of whether the statement of decision issued by the trial court must be construed as final. A statement of decision issued by the court cannot automatically constitute a final decision for purposes of entry of judgment, as Nebraska Beef suggests, because Code of Civil

⁴ Though Nebraska Beef repeatedly calls the court’s filing a “final statement of decision,” the document was simply captioned a “Statement of Decision.”

⁵ *Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 129-130 does not support Nebraska Beef’s position because the appellant in *Whittington* agreed to waive the right to a written statement of decision. As discussed, given the trial court’s ambiguous description of the proposed alternative procedure, Bay World did not clearly waive its right to file objections.

Procedure section 632 and California Rules of Court, rule 232 contemplate that a court may amend its statement of decision after it receives objections from affected parties. Because judgment had not yet been entered, the trial court had inherent power to amend its statement of decision to award prejudgment interest. Even after a court has issued a written decision, the court retains the power to change its findings of fact or conclusions of law until judgment is entered. (*Phillips v. Phillips* (1953) 41 Cal.2d 869, 874-875.) “Until a judgment is entered, it is not effectual for any purpose (Code Civ. Proc., § 664), and at any time before it is entered, the court may change its conclusions of law and enter a judgment different from that first announced. [Citations.] Moreover, a judge who has heard the evidence may at any time before entry of judgment amend or change his findings of fact. [Citations.]” (*Id.* at p. 874.)

DISPOSITION

The judgment is affirmed. Appellant shall bear costs of the appeal.

Parrilli, J.

We concur:

Corrigan, Acting P. J.

Pollak, J.

Trial Court: Superior Court, City and County of San Francisco

Trial Judge: Hon. Diane Elan Wick

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