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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JON E. RIETVELD et al., Plaintiffs and Appellants, v. ROSEBUD STORAGE PARTNERS, L.P. et al., Defendants and Respondents.	C044766 (Super. Ct. No. 00AS06726)

APPEAL from a judgment of the Superior Court of Sacramento County, Joe S. Gray, J. Affirmed.

Havens Law Firm and Lyle Havens for Plaintiffs and Appellants.

Law Offices of Hugh Duff Robertson and Vivian M. Lum for Defendants and Respondents.

Jon and Carole Rietveld sued their former employer, Rosebud Storage Partners, L.P. (Rosebud), alleging breach of contract and fraud. The trial court granted Rosebud's motion for summary

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I through III of the Discussion.

judgment, and the Rietvelds appeal. They assert the evidence presented to the trial court shows breach of the implied covenant of good faith and fair dealing and fraud. In addition, the Rietvelds' attorney, Lyle Havens, contends the trial court erred in imposing sanctions on him for failure to participate meaningfully in judicial arbitration. We affirm.

FACTS AND PROCEDURE

Rosebud runs Armor Mini Storage in Sacramento. Rosebud is a limited partnership, in which defendant Plaza Enterprises, Inc. (Plaza) is the general partner. Hugh Duff Robertson is the president of Plaza.

Jon and Carole Rietveld resided on the property of the storage facility and managed the business. On January 1, 1997, the Rietvelds notified Rosebud that they intended to retire on May 1, 1997.

Robertson asked the Rietvelds to put out the word that Armor Mini Storage was for sale. Jon Rietveld had some experience in valuing storage facilities, so he and Robertson worked together and came up with an asking price of $3.8 million. Public Storage, Sentry Storage, Storage USA, and others immediately showed interest in buying the property. Ben Eisler of Baco Realty toured the facility and submitted an offer for $3.8 million, apparently on behalf of a national chain. The offer letter stated it was a firm offer for $3.8 million with the remaining terms to be negotiated. Eisler's offer was made on March 25, 1997, and expired on March 28, 1997.

When Robertson received the offer letter, he informed Carole Rietveld that she was not to talk to prospective buyers or show them the property or the financials. She was only to notify him that someone was interested. He further stated that he did not want to sell to a national chain.[1] Eisler continued to express his interest in buying the property after the expiration of his offer, at least until April 14, 1997, the date of a note Jon Rietveld sent to Robertson relaying a message from Eisler.

Concerning Eisler's offer letter, Robertson told Carole Rietveld he did not feel it was realistic to provide the information in the timeframe requested in the letter. He also told her that two of his business associates in Los Angeles were vying to purchase the property, which information led her to believe he was not interested in selling the property to Eisler. As a result of discussions with other interested parties, Robertson decided the property could be sold for more than $3.8 million. He made a counteroffer to Eisler, but Eisler was unwilling to pay the higher price. The evidence does not show when Robertson made this counteroffer.

On August 3, 1997, Jon Rietveld entered into an agreement to continue his employment with Rosebud until May 1, 1998, or until escrow for the sale of the property closed. The agreement

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[1] Robertson claimed he did not tell Carole Rietveld he would not sell to a national chain. For the purpose of summary judgment review, we credit Carole Rietveld's statement.

provided for a payment to Rietveld of $30,000 on May 1, 1998. It also provided for an additional payment as follows: "If we sell the property prior to May 1, 1998, you will receive an additional [$30,000] upon the close of escrow." The agreement also provided that Rosebud would pay the additional $30,000 even if the property did not sell before May 1, 1998, on condition it was sold within one year after that date to a party with whom Rosebud was negotiating before May 1, 1998. The Rietvelds received the first $30,000 payment, which is not at issue in this case, but did not receive the additional $30,000.

In his declaration, Robertson stated Rosebud intended to perform under the contract and tried to sell the property but could not. Ultimately, the property was not sold, even after expiration of the contract between Rosebud and Jon Rietveld.

The Rietvelds sued Rosebud and Plaza, alleging causes of action for breach of contract and fraud.[2] Rosebud and Plaza moved for summary judgment. They argued that the breach of contract cause of action was flawed because the condition precedent (sale of the property) to the payment of the additional $30,000 never occurred. They claimed that the fraud cause of action was without merit because the property was available for sale during the term of the contract and the defendants did not intend to defraud the Rietvelds. Rosebud and

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[2] The Rietvelds also alleged a common count for labor, which repeated the allegations of the breach of contract cause of action. Since the common count duplicates the breach of contract cause of action, we need not discuss it separately.

Plaza also asserted that neither Carole Rietveld nor Plaza were proper parties to the lawsuit. The Rietvelds opposed the motion, arguing that, even though the condition precedent was not satisfied, Rosebud and Plaza breached the implied covenant of good faith and fair dealing by not selling the property. Concerning the fraud cause of action, the Rietvelds did not make a separate argument against the motion for summary judgment but simply referred to the argument concerning the implied covenant of good faith and fair dealing.

The trial court granted the motion for summary judgment. It first determined that Plaza was not a proper party to the contract cause of action but there remained a disputed issue of material fact concerning whether Carole Rietveld was a party to the contract. It concluded that the evidence submitted did not show a breach of the implied covenant of good faith and fair dealing because to conclude otherwise would add a term to the contract that the Rietvelds were entitled to the additional $30,000 simply for finding a buyer. It also found the fraud cause of action was not supported by the evidence, relying on Robertson's declaration that, when the contract was formed, the defendants did not intend to defraud the Rietvelds.

The trial court also ordered Lyle Havens, attorney for the Rietvelds, to pay $2,380 in sanctions for willful failure to participate meaningfully in judicial arbitration. The facts concerning this sanction order are recounted in the discussion, below.

The trial court entered judgment in favor of the defendants on June 16, 2003, and the Rietvelds filed their notice of appeal on August 13, 2003.

DISCUSSION

I

Briefing Deficiencies

The Rietvelds' opening brief is deficient. Their attorney quotes major parts of several opinions, both Supreme Court and Court of Appeal, but fails to enclose these paragraphs in quotation marks. He also leaves out footnotes, internal citations, and appropriate ellipses, but gives no indication that anything is left out. Although he cites the cases from which he appropriated the quotes, the pinpoint cites are under inclusive. This unacceptable writing style, even if it was not meant to be deceptive, would have received a failing grade if done in law school.

Counsel for the Rietvelds also fails to substantiate the factual statements made in the brief. In the statement of facts, for example, he recounts the critical facts concerning Jon Rietveld's agreement with Rosebud. The citation to the record to support these factual statements, however, is to the memorandum of points and authorities in opposition to the summary judgment, not to any evidence. "If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived. [Citation.]" (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

Not to be outdone, Rosebud's attorney subtly attempts to influence this court with half-truths and innuendo. Without discussion or citation of authority, Rosebud asserts the appeal must be dismissed as to the issue of sanctions because they were entered against attorney Havens only and he is not a party to this appeal. Research on this issue would have revealed to Rosebud that a sanction order against an attorney can be raised as an issue in an appeal by the party the attorney represents. "Sanction orders or judgments of five thousand dollars ($5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ." (Code Civ. Proc., § 904.1, subd. (b).)

Also, Rosebud notes that this court previously dismissed the Rietvelds' appeals from the sanction order and the order granting summary judgment because they were nonappealable orders. Ignoring the intervening judgment and notice of entry of judgment, Rosebud contends we must likewise dismiss this appeal. Rosebud cites no authority and fails to mention we have already denied a motion to dismiss based on this ground.

Further trying our patience, Rosebud baldly asserts the appeal is untimely. This assertion is not accompanied by authority. Rosebud neglects even to reveal why it believes the appeal is untimely.

Counsel owes a duty to this court to be more forthright (Bus & Prof Code, § 6068; Rules Prof. Conduct, rule 5-200) and

to provide authority for legal arguments (*Roman v. Superior Court* (2003) 113 Cal.App.4th 27, 37), rather than throwing them out off-handedly.

Despite all the problems in the parties' briefs, we elect to disregard the deficiencies and decide the case on the merits. (Cal. Rules of Court, rule 14(e)(2)(C).)

II

Covenant of Good Faith and Fair Dealing

The Rietvelds assert the trial court erred by granting summary judgment as to the cause of action for breach of contract based on breach of the implied covenant of good faith and fair dealing. They contend the evidence supports an inference Rosebud deliberately avoided selling the property during the timeframe of the contract with Jon Rietveld. We conclude summary judgment as to the contract cause of action was proper.

"By now it is well established that a covenant of good faith and fair dealing is implicit in every contract. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683; *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 940; *Brown v. Superior Court* (1949) 34 Cal.2d 559, 564.) The essence of the implied covenant is that neither party to a contract will do anything to injure the right of the other to receive the benefits of the contract. (*Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 460; *Brown v. Superior Court, supra*, 34 Cal.2d at p. 564.)" (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43, fn. omitted.) "'[Where] a contract confers on one party

a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing.' [Citations.]" (*Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 500, bracketed text in original (*Kendall*).)

In *Kendall*, the parties entered into a lease, which provided that the lessee could assign the lease but the lessor had discretionary power to approve or disapprove the assignee proposed by the lessee. (40 Cal.3d at pp. 493-494.) The Supreme Court held that, as a result of the covenant of good faith and fair dealing, the lessor's discretionary power had to be "exercised in accordance with commercially reasonable standards." (*Id.* at p. 500.) The Supreme Court further described the covenant of good faith and fair dealing: "Denying consent solely on the basis of personal taste, convenience or sensibility is not commercially reasonable. [Citations.] Nor is it reasonable to deny consent 'in order that the landlord may charge a higher rent than originally contracted for.' [Citations.] This is because the lessor's desire for a better bargain than contracted for has nothing to do with the permissible purposes of the restraint on alienation -- to protect the lessor's interest in the preservation of the property and the performance of the lease covenants. '"[The] clause is for the protection of the landlord in its ownership and operation of the particular property -- not for its general economic protection."' [Citations.]" (*Id.* at p. 501, italics omitted.)

Applying the methodology used in *Kendall*, we conclude there was evidence that the purpose of the contract between Rosebud and the Rietvelds was to preserve the status quo in the management of the property in order to facilitate the sale of the property. The flaw in the Rietvelds' presentation, however, is that there is no evidence Rosebud had any opportunity to sell to a willing buyer during the period of the contract. While there is some evidence of interest from potential buyers until April 1997, the contract was not signed until August 1997, four months later. Accordingly, there is no evidence upon which a trier of fact could conclude Rosebud failed to "exercise[] [its discretion whether to sell the property] in accordance with commercially reasonable standards." (*Kendall, supra,* 40 Cal.3d at p. 500.)

In their reply brief, the Rietvelds suggest there was a prior oral agreement concerning their continued employment: "It is [the Rietvelds'] contention that the writing came after an understanding had been made between themselves and management where they agreed to stay on as managers after they gave notice at the beginning of the year of their retirement plans. . . . The [Rietvelds'] declarations and the offer from [Eisler] is [*sic*] itself evidence that the [Rietvelds] were already working to try to sell the property prior to having the written agreement but based on the understanding that caused them to continue on as managers even though they had planned to retire."

This argument concerning a prior oral agreement fails for two reasons. First, the complaint alleges only the August 1997

written agreement. The pleadings frame the issues to be decided on summary judgment (*Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1699 [plaintiff wishing to rely on unpleaded theories to oppose motion for summary judgment must first move to amend the complaint]), and no oral agreement is alleged in the pleadings. And second, there is no evidence of an oral agreement or its terms, if there was one. While the Rietvelds assert their conduct before August 1997 was consistent with a prior oral agreement, they did not assert in their declarations that there was such an agreement.

Because there is no evidence Rosebud had an opportunity but declined to sell the property after it entered into the agreement with Jon Rietveld, there is no evidence Rosebud breached the covenant of good faith and fair dealing implied in the written agreement.[3]

III

Fraud Cause of Action

The trial court exercised its discretion pursuant to Code of Civil Procedure section 437c, subdivision (e), and credited Robertson's declaration that, when he signed the contract with Jon Rietveld, he did not intend to defraud the Rietvelds. Based on this evidence, the trial court determined that the Rietvelds could not establish fraud. On appeal, the Rietvelds assert this

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[3] In light of our conclusion the evidence presented to the trial court does not support a breach of contract cause of action, we need not consider the parties' contentions whether Carole Rietveld and Plaza were parties to the contract.

was an abuse of discretion. We conclude the Rietvelds' assertion lacks any substantive support.

Code of Civil Procedure section 437c, subdivision (e) provides: "If a party is otherwise entitled to a summary judgment pursuant to this section, summary judgment may not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof."

Here, the trial court concluded that Robertson's affirmation that he did not intend to defraud the Rietvelds established that an element of a fraud cause of action, intent to defraud, was missing. It therefore concluded the evidence submitted in support of the motion for summary judgment showed lack of merit in the Rietvelds' fraud cause of action. (See *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173 [listing intent to defraud as element of fraud cause of action].)

In their brief, the Rietvelds include only one sentence of argument on this issue. It is as follows: "To the extent that the determination of the motion turns on Mr. Robertson's state

of mind or intention it should be denied so that the parties may have an opportunity to probe his affirmations in open court before a jury." They offer no authority or reasoning for this proposition.

We reverse for abuse of discretion only if the appellant establishes the trial court acted in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 437 [abuse of discretion standard].) The Rietvelds have made no attempt to make this showing, merely asserting that the trial court should not have exercised its discretion in the manner it did. Were we to accept the Rietvelds' argument, we would have to conclude it is always an abuse of discretion for the trial court to credit state of mind evidence pursuant to Code of Civil Procedure section 437c, subdivision (e). Because the Rietvelds have failed to present an argument that the trial court's acted in an arbitrary or capricious manner, we reject their assertion of error.

IV

Sanctions Against Counsel

On May 3, 2002, this case was ordered to judicial arbitration. The arbitrator set a hearing date of June 13, 2002, at 10:00 a.m. and notified Lyle Havens, counsel for the Rietvelds, that he was required to provide copies of the complaint and answer and a short arbitration brief 10 days prior to the hearing. On June 13, Havens arrived at the arbitration

hearing 25 minutes late, having failed to provide the requested copies of the complaint and answer and an arbitration brief.

The Rietvelds did not attend the arbitration hearing and were not available by telephone. During the hearing, Havens did not present any evidence in support of the Rietvelds' claims. Instead, he stated that he agreed with the facts in Rosebud's arbitration brief.

The arbitrator entered an award in favor of Rosebud, also awarding Rosebud its costs. Soon thereafter, Havens filed a request for trial de novo. Rosebud filed a motion requesting sanctions against the Rietvelds and Havens for willful failure to participate meaningfully in judicial arbitration. Havens filed an opposition to the motion for sanctions in which he stated that it was unnecessary to present evidence at the arbitration because judicial arbitration often proceeds in the form of a mediation or settlement conference. He further suggested that the ability to request a trial de novo essentially renders judicial arbitration meaningless. Finding Havens violated a local rule in his conduct with respect to arbitration, the trial court awarded sanctions against Havens, but not the Rietvelds, in the amount of $3,055.50, later reduced to $2,380.00.

Havens contends the sanction order must be reversed because such an award is not permissible based on the willful failure to participate meaningfully in judicial arbitration. He also contends he did not willfully fail to participate meaningfully in arbitration. We find no merit in his contentions.

Code of Civil Procedure section 575.2 allows a court to impose sanctions for noncompliance with local rules. The trial court "may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose other penalties of a lesser nature as otherwise provided by law . . . ." (Code Civ. Proc., § 575.2, subd. (a).)

Rule 12.04(A) of the Superior Court of Sacramento County (Local Rule 12.04) provides: "For the willful failure to meaningfully participate in arbitration proceedings the court, on noticed motion, may impose sanctions; including arbitrator's fees, attorney's fees and costs. [¶] (1) The following may be considered failures to meaningfully participate in arbitration: [¶] (a) Non-appearance, at the time set for hearing, of any person necessary to proceed to a meaningful conclusion. (Phone calls to the arbitrator at the time set for hearing will not be deemed an appearance.) [¶] (b) Failure to offer any evidence or rebuttal. [¶] (c) Submission of a motion to continue the arbitration hearing less than five days before the scheduled date, except upon a showing of good cause. [¶] (d) Failure to complete arbitration within the time fixed therefor." (See www.saccourt.com/geninfo/local_rules/PDFChapters/CH12.PDF.)

In its order awarding sanctions, the trial court found that Havens arrived late to the arbitration, failed to provide the pleadings and brief requested by the arbitrator, failed to have the Rietvelds appear or be available by telephone, and failed to produce evidence, including testimony that was necessary to

support the Rietvelds' case. Havens asserted that it would have been futile to produce evidence because the arbitrator determined the contract did not obligate Rosebud to sell the property. The trial court ruled, however, that "[t]his after-the-fact rationalization fail[ed] to explain why Mr. Havens appeared at the arbitration, prior to any determination by the arbitrator concerning the contract, with no evidence whatsoever." The court concluded that Havens's decision not to produce evidence was based on his "belief that mandatory judicial arbitration is an essentially meaningless proceeding for which minimal effort should be made."

Havens's conduct with respect to the judicial arbitration violated two parts of Local Rule 12.04 which allows sanctions for willful failure to participate meaningfully in judicial arbitration. He failed to have the Rietvelds appear. Their presence was "necessary to proceed to a meaningful conclusion" because they were witnesses concerning the conduct they alleged in their complaint and because they could have approved any settlement negotiated at the arbitration hearing. Havens also failed to produce evidence. This is especially egregious and showed his lack of good faith because he represented the plaintiffs, who bore the burden of proof in this action.

Havens asserts the Rietvelds could not attend because they resided in Arkansas and were visiting their daughter in Maryland at the time of the arbitration. There is no indication, however, that Havens attempted to procure the presence of the Rietvelds or to reschedule the arbitration to accommodate them.

Instead, he claims: "They had nothing to say that they had not already said in their responses to the special interrogatories which were before the arbitrator as an attachment to the defendants' arbitration brief." This statement merely exhibits Havens's failure to take seriously the arbitration hearing. The arbitrator was empowered to make factual findings. Although much of the content of the Rietvelds' testimony may have been included in the answers to interrogatories, the arbitrator should have been given the opportunity to evaluate their testimony and determine their credibility. Furthermore, unlike in the summary judgment proceedings, the arbitrator was not bound to deem the Rietvelds' interrogatory answers credible.

Havens further contends that the provision of Local Rule 12.04 requiring the attendance of those who are "necessary to proceed to a meaningful conclusion" conflicts with state laws which allow litigants to use the subpoena power (Cal. Rules of Court, rule 1613) and permit an arbitrator to go forward with the hearing even if a party fails to attend (Cal. Rules of Court, rule 1610). Havens does not explain the alleged conflict between these rules of court and Local Rule 12.04 and we discern no conflict. Neither of the rules of court state that a party need not attend the arbitration hearing unless subpoenaed.

As he did in the trial court, Havens continues to assert it was unnecessary for him to produce evidence because it was all contained in the attachments to Rosebud's arbitration brief. The trial court responded to this assertion in its order, and Havens offers no reply. The court stated: "It appears to the

Court that parole [*sic*] evidence may have been necessary to explain and/or fill in the terms of the contract. Additionally, [the Rietvelds'] allegation in their complaint that they had performed all conditions on their part, including finding and negotiating with the qualified buyers for the property, would require an evidentiary showing by [the Rietvelds]." Havens's retort that all of the evidence was contained in the answers to special interrogatories is of no assistance because, as noted, the arbitration was a fact-finding affair and the arbitrator needed to make credibility determinations.

Accordingly, we conclude that the record supports the trial court's conclusion Havens violated Local Rule 12.04 and that Local Rule 12.04 does not conflict with state law.

Havens further contends that Code of Civil Procedure section 575.2 does not authorize monetary sanctions and, even if it does, the sanctions imposed here were excessive. Code of Civil Procedure section 575.2, subdivision (a), allows, as a penalty for violation of local rules, striking of pleadings, dismissal of part or all of an action, or "penalties of a lesser nature as otherwise provided by law . . . ." It also allows the moving party to recover fees and costs incurred in making the motion for sanctions. (*Ibid.*) Monetary sanctions are penalties of a lesser nature than dismissal. And, Local Rule 12.04 provides for monetary sanctions to recompense fees and costs. The award here was based on the fees and costs Rosebud incurred in arbitration and in making the motion for sanctions. Thus, the award was provided for by law.

Havens's argument that the award was excessive is also without merit. He complains "the amount of sanctions awarded is grossly and unfairly excessive, representing an entire month's income for an attorney who represents the indigent such as plaintiff's counsel in the instant case, and this one month's income is to compensate for a one hour arbitration hearing, and is fully 10% of the damages demanded in the complaint." He then goes on to assert that arbitrators only receive $150 per hour and that judicial arbitration is not binding. Nonetheless, he does not dispute the fact that the sanction award was based on Rosebud's fees and costs incurred in arbitration and in making the sanctions motion, which totaled $3,055.50, later reduced to $2,380.00. It was not excessive, under the circumstances.

DISPOSITION

The judgment is affirmed. (*CERTIFIED FOR PARTIAL PUBLICATION*.)

NICHOLSON, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.