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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

COURT OF APPEAL – SECOND DIST.

DIVISION TWO

**FILED**

**Apr 03, 2018**

JOSEPH A. LANE, Clerk

izelaya Deputy Clerk

MICHAEL GEE FIERSTEIN,

B281246

Plaintiff and Respondent.

(Los Angeles County  
Super. Ct. No. SC123624)

v.

FOX ENTERTAINMENT GROUP,  
LLC,

Defendant and Appellant,

APPEAL from an order of the Superior Court of  
Los Angeles County. Gerald Rosenberg, Judge. Affirmed.

Fox Rothschild, Lawrence C. Hinkle II and  
Rom Bar-Nissim for Defendant and Appellant.

McPherson Rane, Edwin F. McPherson, Pierre B. Pine;  
Zerner Law and Larry Zerner for Plaintiff and Respondent.

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In this breach of contract action between Michael Gee Fierstein (Fierstein) and Fox Entertainment Group, LLC (Fox), the jury gave inconsistent answers to questions in a special verdict form. Because of that, the trial court granted Fierstein a new trial. Fox appeals on the ground, inter alia, that the order granting a new trial should be reversed because the special verdict was not inconsistent.

We find no error and affirm.

### **FACTS**

This case went to trial on Fierstein's breach of contract claim against Fox. At the conclusion of the trial, the jury began deliberating. On the second day of deliberations, the jury asked a question about questions 4 and 5 on the original special verdict form. Fierstein's counsel asked that those questions be removed. In contrast, Fox's counsel asked that they be kept. The trial court decided not to alter the questions. As an alternative, it decided to provide instructions as to what the jury should do in the event they answered yes or answered no. The jury was given a revised special verdict form, and then a second revised special verdict form. That form was given over objection by Fierstein's counsel. He argued that the inclusion of questions 4 and 5 was confusing.

The second revised special verdict form contained, inter alia, the following questions and instructions:

1. Did Fierstein and Fox enter into a contract? (If the answer was no, the jury was told to stop and answer no further questions.)
2. Did Fierstein do all, or substantially all, of the significant things that the contract required him to do? (If the

answer was yes, the jury was told to skip to question 4. If the answer was no, the jury was told to answer question 3.)

3. Was Fierstein excused from having to do all, or substantially all, of the significant things that the contract required him to do? (If the answer was yes, the jury was told to answer question 4.)

4. Did all the conditions that were required for Fox's performance occur? (If the answer was no, the jury was told to stop and answer no further questions. If the answer was yes, it was told to answer question 5.)

5. Were the required conditions that did not occur for Fox's performance excused? (If the answer was no, the jury was told to answer question 6. If the answer was yes, the jury was told to stop and answer no further questions.)

6. Did Fox fail to do something that the contract required it to do? Did Fox unfairly interfere with Fierstein's right to receive the benefits of the contract?

7. Was Fierstein harmed by the conduct of Fox?

8. What was the date and the amount of Fierstein's damages related to Watchbiz/Michael Weinberger's order of watches?

9. What was the date and the amount of Fierstein's damages related to Intertrade/Karl Naufal's order of watches?

10. Did Fierstein fail to mitigate his damages?

11. What is the total amount of damages you are awarding to Fierstein?

The jury answered yes to questions 1, 2, 6 (both queries) and 7. As to questions 8 and 9, the jury calculated damages in the amounts of \$351,125 and \$118,720, respectively. For question 9, the jury determined that Fierstein failed to mitigate

his damages in the amount of \$16,960. The total damages awarded by the jury under question 11 was \$452,885. In contrast, the jury answered no to questions 4 and 5 as to whether all the conditions for Fox's performance had occurred or were excused.

The trial court polled the jury about their votes. The jurors voted nine to three to award Fierstein damages. The same nine jurors who voted no on question 4 otherwise voted in favor of Fierstein on the other questions. In contrast, the same three jurors who voted yes on question 4 otherwise voted in favor of Fox on the other questions.

Fierstein's counsel pointed out that the special jury verdict was inconsistent, and said, "I think we have to inquire if they understood question four."

Addressing the foreperson, the trial court read question 4 and pointed out that nine jurors voted no and three jurors voted yes. The foreperson said, "That was the old instructions." The trial court replied, "No. That was . . . the instruction, but yet you went on. Was there confusion? Why did you go on?" The foreperson said the jury believed it was supposed to continue if it answered no to question 4.

Over the objection of Fierstein's counsel, the trial court discharged the jury. It then ordered Fox's counsel to prepare a judgment.

Fierstein filed a motion requesting that the trial court set aside the judgment, grant a judgment notwithstanding the verdict (JNOV), or grant a new trial. The motion included declarations of multiple jurors stating that they misunderstood question 4 and their votes on the question should have been the opposite.

The trial court denied the motion to set aside the judgment, noting that “[t]here is no judgment.” It denied the motion for JNOV because there was no assertion that the special verdict was unsupported by substantial evidence. The new trial motion was granted. The trial court stated, “The Special Verdict form made inconsistent and contradictory findings. The response[s] to Question[s] 4, 5, and 6 are inconsistent. [¶] This ruling does not rely on the juror declarations.”

This appeal followed.

## DISCUSSION

### I. Standard of Review.

“The determination of a motion for new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside.” (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387.)

In contrast to the preceding, a reviewing court utilizes its independent review when deciding whether a special verdict is inconsistent. (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 358 (*Singh*.)

### II. New Trial Proper.

“A special verdict is inconsistent if there is no possibility of reconciling its findings with each other. [Citation.]” (*Singh, supra*, 186 Cal.App.4th at p. 357.) “An inconsistent verdict may arise from an inconsistency between or among answers within a special verdict [citation] or irreconcilable findings. [Citation.]

Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law. [Citation.] The appellate court is not permitted to choose between inconsistent answers. [Citations.]” (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682 (*San Diego*).

An inconsistent verdict is ground for a new trial because it is ““against the law.”” (*San Diego, supra*, 126 Cal.App.4th at p. 682; Code Civ. Proc., § 657, subd. (6).)

According to Fox, the new trial order was improper because the jury did not make inconsistent findings on essentially identical factual questions. Presumably, Fox means to argue that there was no inconsistency because the jury did not find that the conditions for Fox’s performance had and had not occurred, and that the conditions were and were not excused. In making this argument, Fox relies on *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1320 (*Bermudez*), a case noting that a variety of cases determined that verdicts were inconsistent because a jury made inconsistent findings when answering two essentially identical factual questions pertaining to different theories of liability or damages.

*Bermudez* does not aid Fox’s cause because it is distinguishable, and it does not draw the rule of inconsistency as narrowly as Fox suggests.

The question posed in *Bermudez* was whether a jury had inconsistently found that a driver was negligent but had not caused damage to the plaintiff. (*Bermudez, supra*, 237 Cal.App.4th at p. 1320.) The appealing party argued that the findings were irreconcilable because they were “logically inconsistent.” (*Ibid.*) The court disagreed because it was

logically consistent for the driver to be negligent, and for his negligence not to be a substantial factor in causing harm to the plaintiff. (*Id.* at pp. 1320–1321 [some acts or omissions accurately classified as negligent do not necessarily have a causal role in motor vehicle accidents].) In engaging in this analysis, the trial court examined whether the findings at issue were inherently inconsistent. It did not limit its inconsistency analysis to determining if there were contradictory findings on essentially identical factual questions.

The circumstances here are the opposite of *Bermudez* based on the order of the positive and negative findings. It is logically consistent for there to be a positive finding of negligence in *Bermudez* and a negative finding on proximate cause because the first finding did not dictate the second. In contrast, a finding that Fox failed to do something required by the contract or interfered with Fierstein’s right to receive the benefits could not be made without the assumption that Fox had a duty to perform. Thus, what the jury did here in answering questions 4, 5 and 6 was not logically consistent. The answer to question 6 was legally permissible if and only if the jury had answered yes to either question 4 or 5.

Because the special verdict was inconsistent as a matter of law, the trial court did not abuse its discretion when granting Fierstein’s motion for new trial.

All other issues raised by the parties regarding the motion for new trial are moot.

### III. Motion to Dismiss.

Fierstein filed a motion to dismiss this appeal as frivolous. If we dismiss it, he seeks sanctions.

An appeal is frivolous if it is brought for an improper motive such as harassment or delay, or if any reasonable attorney would agree that the appeal is totally and completely without merit. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Fierstein argues that this appeal is intended to harass him. As evidence, he posits that Fox lacks a good faith argument for reversal, and that harassment is this appeal's only possible reason. In support, he avers that this appeal is impossible for Fox to win because the inconsistency in the special verdict is obvious, a reviewing court is required to give the trial court's order extraordinary deference, and granting a new trial was the least the trial court could do after the jury's obvious confusion.

First, whether the special verdict is inconsistent requires nuanced analysis because there are no cases directly on point, and because the generalized statements of law in the cases provide Fox with at least some ammunition for its arguments. (See *Bermudez, supra*, 237 Cal.App.4th at p. 1320.) Second, as already discussed, inconsistency in a special verdict is a question of law, so we do not owe the trial court deference as to that issue. Accordingly, we cannot conclude that Fox filed this appeal to harass Fierstein.

The motion to dismiss is denied.



**DISPOSITION**

The order is affirmed. Fierstein shall recover his costs on appeal.

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\_\_\_\_\_, Acting P. J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, J.  
CHAVEZ

\_\_\_\_\_, J.  
HOFFSTADT