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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PERSON FORD,

Plaintiff and Respondent,

v.

FORD MOTOR COMPANY,

Defendant and Appellant.

B196340

(Los Angeles County
Super. Ct. No. KC041147)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Dan Thomas Oki, Daniel J. Buckley, Karl W. Jaeger, Judges. Affirmed.

Baker & Hostetler, Cranston J. Williams; Snell & Wilmer, Richard A. Derevan,
Todd E. Lundell for Defendant and Appellant.

Engstrom, Lipscomb & Lack, Robert J. Wolfe, Robert T. Bryson, Edward P.
Wolfe for Plaintiff and Respondent.

An automobile dealership sued an automobile manufacturer for reneging on a contract. A jury found that the manufacturer breached the implied covenant of good faith and fair dealing, and judgment was entered in favor of the dealership. We affirm.

FACTS

Person Ford (Person) has operated an automobile dealership in the City of La Verne for 25 years, under a franchise agreement with Ford Motor Company (Ford). Ford dealerships are assigned a geographic territory. Disputes arise when dealerships relocate, as relocation impacts (in Ford's words) "the delicate balance among its various dealerships."

A dispute arose in 1988, when Ford decided to relocate a dealership in Glendora to a site four miles from Person. Person protested the proposed relocation because it diminished Person's primary market area. Ford settled its dispute with Person by agreeing that Person could relocate either to the west of its location or to the Ontario Auto Center. The Glendora dealership moved to its new site near Person in 1991, though Person did not move.

Another dispute arose in 1992, when Ford decided to relocate a dealership in Pomona to a site 2.9 miles from Person. Person challenged the proposed relocation with Ford and with the California New Motor Vehicle Board. A Ford regional manager suggested that Person settle the dispute by relocating to a site in Rancho Cucamonga, near a planned extension of the 210 Foothill Freeway (the New Freeway). Rancho Cucamonga was a growing market. However, it was unclear when the New Freeway would be completed, and there was no purpose in moving next to a freeway that did not yet exist.

Person's dispute with Ford was resolved by a 1993 settlement agreement (the Agreement). The Agreement authorizes Person to move to Rancho Cucamonga near the New Freeway, or to another site in La Verne. Ford gave a five-year Letter of Commitment for this relocation. If Person's relocation did not occur within five years, the Agreement provides for an extension of time: if "an extension should be needed due to circumstances beyond the control of Person Ford (e.g. completion of highway

construction), Ford would not withhold approval for what in its opinion is a reasonable extension period if supported by the then current Market Study.” A Ford market study in 1996 supported Person’s relocation to Rancho Cucamonga.

Person did not relocate during the first five years provided for in the Agreement because the New Freeway was not completed. In April 1998, Person requested an extension of the Agreement that would last until after completion of the highway. Person was initially assured that Ford would extend the Agreement until the New Freeway was completed. During the fall of 1998, one of Ford’s regional managers circulated a memorandum stating that management did not support giving Person an extension. However, Ford’s general counsel advised management that an extension had to be given until 2003 or until the New Freeway was completed, whichever was later.

In April 1999, Ford agreed to an extension that would last “until completion of the construction of [the New Freeway], or completion of the next market study of the Pomona market area, whichever occurs first. Further, if a market study is completed before [the New Freeway], we will then consider whether a further extension should be granted based on the results of the new market study.”

Despite its approval of an extension for Person, Ford formulated a secret business plan in 1999 that would merge Person with another dealership and cause Person’s business to disappear. Ford completed a market study in 2001. The new study rejected Person’s relocation to Rancho Cucamonga, even though the site offered customer convenience, good spacing between dealerships, and higher traffic volume than Person’s current location.

Citing its 2001 market study, Ford informed Person its obligation to support Person’s relocation was terminated. Ford’s rationale was that there were six Ford dealerships within a 10-mile radius, and that Rancho Cucamonga ceased being a growth market. Ford agreed to support Person “at its current location” in La Verne.

Person sued Ford for terminating its Agreement to support Person’s relocation. The case was presented to a jury on theories of breach of contract, breach of the implied covenant of good faith and faith dealing, and promissory fraud. Person contended that

Ford deprived it of the benefits of the Agreement by justifying the termination of its support for relocation “with a false, fabricated and misleading market study.” At trial, Person’s evidence focused on Ford’s reluctance to act on Person’s 1998 request for an extension and unwillingness to grant any extension at all, which Person saw as part and parcel of Ford’s plan to phase Person out of existence through a merger. Also, Person focused on the bad faith and lack of impartiality of the 2001 market study.

The jury rendered a special verdict. With respect to promissory fraud, the jury found that Ford “made a promise to Person Ford that was important to the transaction, and . . . intended to perform this promise when it made it.” Thus, there was no false promise. With respect to the contract claim, the jury found that Ford “did not fail to do something that the contract required it to do.” However, the jury found that Ford breached the implied covenant of good faith and fair dealing.

The jury awarded Person \$2,675,906 for “past economic loss, including lost profits” and \$9,574,600 for “future economic loss, including lost profits” as a result of not being able to relocate to Rancho Cucamonga. The trial court denied Ford’s motions for a new trial and for judgment n.o.v. Ford’s appeal from the judgment timely follows the denial of its posttrial motions. (Cal. Rules of Court (2007 ed.) former rule 8.108(a), (c).)¹

DISCUSSION

1. Applicability Of The Implied Covenant

Ford contends that Person’s claim for breach of the implied covenant of good faith and fair dealing fails as a matter of law. The Agreement allowed Ford to extend its commitment to Person’s relocation beyond the five years specified in the Agreement “for what in its opinion is a reasonable extension period.” Ford reasons that because the

¹ Ford has abandoned its appeals from a discovery sanctions order and from an order on Ford’s motion to tax costs. (*Troxell v. Troxell* (1965) 237 Cal.App.2d 147, 148, fn. 2.)

parties contracted to give Ford discretion to extend the commitment period, Ford cannot be held liable for exercising that discretion.

Implied into every contract is a duty that the parties will act in good faith and deal fairly with each other in performing the contract. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371 (*Carma*)). The implied covenant is read into a contract “to protect the express covenants or promises of the contract.” (*Id.* at p. 373.) Although generally “implied terms should never be read to vary express terms” (*Id.* at p. 374), the rules are less clear when a contractual term gives one party discretionary powers. “The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith.” (*Id.* at p. 372; *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 803.) “A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable.” (*Carma, supra*, 2 Cal.4th at p. 372.)

In this case, Ford allowed two rival dealerships to move near Person, cutting into Person’s market and prompting Person to lodge protests with Ford and with a state agency. To settle this dispute and induce Person to retract its protests, Ford agreed to support Person’s relocation to Rancho Cucamonga, to a site adjacent to an as-yet unbuilt freeway. Person could not enjoy the benefits of the Agreement until the New Freeway was completed. The New Freeway was not completed within the initial five-year commitment period given by Ford.

Ford agreed that it would “not withhold” its approval for an extension of time, if the need for it was caused by forces beyond Person’s control (such as a delay in freeway construction). Although Ford reserved the right to decide “what in its opinion is a reasonable extension period,” the granting of an extension period was governed by two factors: (a) completion of the New Freeway, and (b) a supportive market study. Thus, Ford’s discretion is constrained, not unfettered.

As a result, Ford did not have a contractual right to withdraw its support for Person’s relocation, unless there was a justification for doing so. Applying a standard of

reasonableness--when assessing Ford's justification for withdrawing support--does not vary or contradict an express term of the contract, as it might if Ford had unconstrained, unfettered discretion to withdraw its support for relocation at any time, for any reason.² The purpose of the Agreement was to give Person an opportunity to relocate. This purpose--and Person's legitimate expectations--would be defeated if Ford was not required to act in good faith when exercising its discretion to terminate the Agreement.

The principle is aptly illustrated in *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354. There, a film studio had the option of producing films proposed by plaintiff Locke. The studio rejected all of Locke's proposals, allegedly to please her ex-boyfriend, Clint Eastwood, with whom Locke no longer had an amicable relationship. (*Id.* at pp. 358-360.) Though the studio had discretion in choosing the films it developed, the implied covenant prevented it from "categorically refusing to work with her, irrespective of the merits of her proposals," thereby denying Locke the benefits of the contract. A triable issue was presented as to "whether Warner had an honest or good faith dissatisfaction with Locke's proposals, or whether it merely went through the motions of purporting to 'consider' her projects." (*Id.* at p. 365.) In sum, "the agreement gave Warner *discretion* with respect to developing Locke's projects. The implied covenant of good faith and fair dealing obligated Warner to exercise that discretion honestly and in good faith." (*Id.* at p. 367.)

² The courts have implied a duty to act in good faith even in cases that involve unfettered contractual discretion. (See *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 924 [a bank that had sole discretion to set the charges for insufficient funds had to exercise its discretion in good faith to save the contract from being illusory]; *Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 484 [where a contract permitted a buyer of sugar beets to unilaterally set the purchase price, the implied covenant obligated the buyer to set a fair price]; *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 393 [where a lender is authorized to obtain insurance for a borrower but the loan agreement leaves the method for calculating premium reimbursement to the lender's sole discretion, the discretionary power must be exercised in accordance with reasonable standards].)

In this case, Ford formulated the 2001 market study used to justify terminating its support for Person's relocation. The Agreement did not give Ford the express right to fabricate a market study using incorrect data or improper analysis. The jury was entitled to decide whether Ford's market study was an honest and good faith assessment of Person's prospects in Rancho Cucamonga, or whether Ford "merely went through the motions" in creating a market study aimed at putting into effect the goal management identified in 1999, which was a merger that would extinguish Person's existence. If the market study was not formulated honestly and in good faith, then Ford exercised its discretion in a manner that frustrated Person's right to receive the benefits of the contract.

Ford insists that the jury could not have arrived at the sensible interpretation of the Agreement that we have outlined. At trial, Person claimed that Ford was obligated to support relocation until completion of the New Freeway. By contrast, Ford claimed that it had *sole discretion* to determine the length of time it would support relocation, which would last only until a new market study was completed, if the study preceded the New Freeway.

The jury was instructed that it "may consider the usual and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract." The only sensible reading of the Agreement and its 1999 extension is the one we believe the jury made here. Ford did have some discretion (as it claimed). But that discretion was not limitless: when Ford completed the 2001 market study, its study had to be fair and honest if it was going to be used to justify the withdrawal of Ford's support for relocation. Ford could not produce a meaningless market study based on false premises without thwarting Person's right to the benefits of the Agreement.³ A duty

³ If, as Ford contends, its contractual obligations were fulfilled when it completed a market study "regardless of the market study's content," then presumably Ford could compile a collection of nursery rhymes, call it a "market study" and claim to have satisfied the Agreement. This could not be what the parties intended when they entered

of fair dealing must be read into the Agreement; otherwise, the Agreement is an empty vessel.

Substantial evidence supports a finding that Ford's 2001 market study was not formulated honestly or in good faith. First, there was evidence that Ford applied more stringent criteria to Person's relocation than it applied to other dealerships. Second, Ford did not perform any analysis to substantiate its decision to withdraw support for Person's relocation. Third, the analysis that Ford ultimately offered was performed after the 2001 market study was completed and used information not available to Ford when the study was prepared, i.e., it was an after-the-fact rationalization. According to the testimony, the market study contained falsehoods, manipulated facts, and applied inconsistent methodologies.

By the same token, the testimony presented at trial showed that Person's proposed relocation was to an optimal site for a Ford dealership. In 2001, when the market study was completed, Rancho Cucamonga outpaced demographic projections previously made in Ford's earlier market studies, which supported relocation. The proposed location offered customer convenience, good spacing between Ford dealerships, and a higher traffic count than at Person's existing location in La Verne. The relocation would not negatively impact other Ford dealerships.

Based on these facts, and Ford's implied duty to act in good faith, the jury could conclude that Ford exercised its discretion in a way that unfairly deprived Person of the benefits of the Agreement.

2. Causation

Ford contends that Person failed to prove causation because the damages award is predicated on the assumption that Person would have been able to relocate to Rancho Cucamonga and realize greater profits in that location. Ford did not guarantee that Person could relocate and another dealership could have exercised the right to challenge

the Agreement. A legitimate market study undertaken in good faith must have been intended.

or protest Person's move to Rancho Cucamonga before the New Motor Vehicle Board. At trial, Ford presented testimony from one dealer, at Sunrise Ford, who stated that he "would protest any movement of any dealership to within 10 miles of my current location. That's my right." He was unsure whether Person's proposed site by the New Freeway was 10 miles from Sunrise. Ford points to a lack of evidence supporting a finding that Person could overcome a protest.

The likelihood of a protest--let alone a successful protest--is but one factor in this case. Ford is treating Sunrise's hypothetical protest as a *fait accompli*, rather than a possibility.⁴ There was conflicting evidence on the topic. One former Ford employee, a national market manager, stated that it is uncommon for one dealership to protest the relocation of another. Another former Ford employee, a regional sales manager, testified that he did not believe a protest would have arisen because in 2001, Sunrise itself relocated further away from Rancho Cucamonga. Person introduced expert testimony that its relocation would not impact surrounding dealers, including Sunrise. There was evidence that the proposed site was optimal for a Ford dealership.

In short, the jury could find that a protest from Sunrise was too hypothetical and uncertain a factor to be determinative. Even assuming that a timely protest were made, the jury had to further assume that the protest would not be abandoned. There is no indication that such protests ever succeed, even if they are not abandoned. Ford reaches too far in demanding that Person prove it would prevail in a dispute between dealerships that might not even occur.

3. Jury Instructions

Ford contends that the court should have instructed the jury differently. "No judgment shall be set aside, or new trial granted, in any cause, on the ground of

⁴ The trial court found that evidence regarding a protest was "purely speculative, as such a protest was never filed nor adjudicated." The same holds true for three unnamed dealers who supposedly had "plans to protest this relocation."

misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Const. art. VI, § 13.) Actual prejudice to the appealing party must be demonstrated. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) A party’s desire for “ ‘pinpoint’ instructions” that emphasize its theory of the case need not be countenanced: the issue is whether the jury was misled by the instructions given. (*Id.* at pp. 581-582.)

With respect to the implied covenant, the court gave the standard instruction, CACI No. 325: “In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party will not do anything to unfairly interfere with the right of any party to receive the benefits of the contract; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract.” The court rejected Ford’s special instruction.⁵

With respect to damages, the court gave the standard instruction, CACI No. 3903N: “To recover damages for lost profits, Person Ford must prove it is reasonably certain it would have earned profits but for Ford[’s] conduct. [¶] To decide the amount of damages for lost profits, you must determine the gross amount Person Ford would have receive but for Ford[’s] conduct and then subtract from that amount expenses Person Ford would have had if Ford[’s] conduct had not occurred. [¶] The amount of the lost

⁵ Ford’s special instruction reads, “In determining whether the extension granted by Ford [] was reasonable, you must limit your inquiry to whether Ford [] acted in good faith in providing the extension. In other words, whether Ford [] lacked any basis for giving the type of extension that it did. You must not substitute your own opinion, or that of Person Ford, for Ford [’s] opinion as to what is reasonable.”

profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.” The court rejected Ford’s special instruction.⁶

Ford has not demonstrated that the instructions given to the jury were misleading or resulted in actual prejudice. The standard instruction on the implied covenant correctly and adequately stated the law, unlike Ford’s special instruction, which reflects only Ford’s position that the Agreement gave it sole, unfettered discretion. As we have discussed above, the Agreement lends itself to a reading that Ford’s discretion was limited, not unfettered. The standard instruction on damages is the appropriate one, unlike Ford’s special instruction regarding protests by other dealers. As discussed above, a possible protest by another dealer was but one factor for the jury to consider in this case. It is not a sufficiently determinative factor to require a special instruction.

4. Consistency Of The Verdict

Ford challenges the judgment on the grounds that the verdict is inconsistent. The jury found that Ford did not breach the express promises of the contract, but found that Ford breached the implied covenant of good faith and fair dealing. Ford deems these findings to be inconsistent.

“[B]reach of a specific provision of the contract is not a necessary prerequisite” to finding a breach of the implied covenant; “[w]ere it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract.” (*Carma, supra*, 2 Cal.4th at p. 373; *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 63, fn. 15.) “[T]he implied covenant is just that--‘implied’--and it functions because something has not been expressly mentioned in a contract.” (*Acree v. General Motors Acceptance Corp., supra*, 92 Cal.App.4th at pp. 394-395.)

⁶ The special instruction reads, in part that “[i]n order to award damages to Person Ford, you must determine that it was reasonably certain that: . . . Person Ford would have been able to overcome any protests by other dealers to the relocation”

In this instance, it is not inconsistent that the jury found no breach of the express provisions, but did find a breach of the implied covenant. The Agreement and its extension expressly required that Ford perform a market study, and the company did produce a market study. The covenant that is implied, not express, is that the market study had to be formulated in a fair and honest manner, rather than be misused as a tool to effectuate Ford's plan to eliminate Person's dealership.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.