



Foto-Kem Industries

2002 | Cited 0 times | California Court of Appeal | December 19, 2002

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In this breach of contract action, defendant and appellant Giants Entertainment, Inc. appeals from an order granting plaintiff and respondent Foto-Kem Industries, Inc.'s application for a right to attach order and order for issuance of writ of attachment against Giants. Giants contends the trial court erred in issuing the writ in the amount of \$83,940.69, in that the trial court refused to consider Giants's opposition, and Foto-Kem's claim was secured by an interest in personal property worth more than the amount of the attachment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Giants is a motion picture production company. Foto-Kem is a post-production laboratory that processes and develops motion picture negatives. In 2000, Foto-Kem performed film processing work for Giants.

On July 26, 2001, Foto-Kem filed a complaint against Giants for breach of contract damages in the amount of \$86,688.26. The complaint alleged as follows. On December 28, 1999, Giants entered into a contract with Foto-Kem for Foto-Kem to provide post-production services to Giants. The contract consisted of a "Credit Application and accompanying Terms and Conditions." Thereafter, between April 13, 2000, and June 16, 2000, Giants created six sub-accounts with Foto-Kem for six of Giants's film projects. Foto-Kem performed all post-production work for Giants pursuant to the contract in the amount of \$96,688.26. Giants paid \$10,000, leaving a balance of \$86,688.26 unpaid and owing.

On July 27, 2001, Foto-Kem filed an application for a right to attach order and order for issuance of writ of attachment against Giants in the revised amount of \$93,940.69 (\$83,940.69 plus \$10,000 in attorney fees). In support of the application, Foto-Kem submitted a declaration of Donna Cottone, Credit Manager at Foto-Kem, with the following attachments: (1) copies of the contract and sub-account documents; (2) a letter from Foto-Kem to Giants stating that Foto-Kem had a lien on and security interest in all films presently in its possession; and (3) statements of account for each sub-account, stating the purchase order, work order, and invoice numbers, corresponding invoice value or invoice amount and payments. The hearing on the application was initially set for August 31,



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2001, but was continued by stipulation to December 14, 2001.¹

On December 10, 2001, Giants filed opposition to the application, supported by declarations of David Dadon, president of Giants, and Angela Burris, an accountant. Dadon declared: Foto-Kem held nine of Giants's master negatives and "refus[ed] to release [them] until the balance [was] paid"; "[t]ogether, these films are valued at approximately thirty million dollars"; and Foto-Kem promised a discount of five percent on all work. Burris declared that, after she had recalculated all invoices, used price lists provided by Foto-Kem, and applied a five percent discount, she concluded Giants had overpaid Foto-Kem by \$4,711.11.

The hearing was held on December 14, 2001. The trial court made findings pursuant to Code of Civil Procedure section 484.090, as follows. "One of [the required findings], the claim upon which attachment is based, is one upon which attachment may be issued. And there the claim is for money owed on a line of credit. [¶] There is a declaration filed by [Cottone], who is the credit manager for Foto-Kem, which authenticates the records evidencing the existence of a line of credit and the amount owed. Since the contractual amount is a fixed or readily ascertainable amount, attachment is proper. [¶] The second element that must be considered, the plaintiff has established the probable validity of the claim upon which the attachment is based. Again, declaration of [Cottone] and attached documents establish the probable validity of the claim, and it is set forth in detail. There is a claim in addition to the [\$83,940.69] owed. And they are requesting [\$10,000] in attorney's fees, for a total request of \$93,940.69. [¶] The third element, attachment is not sought for a purpose other than recovery on the claim upon which the attachment is based. That's satisfied. [¶] The amount to be secured by the attachment is greater than zero, and indeed that has been satisfied. [¶] The [trial] court believes the application is proper, with the exception [of the claim for attorney's fees]." The trial court ordered the writ of attachment to issue for \$83,940.69 upon the posting of a \$7,500 bond. Since the bond had been posted, the trial court ordered the writ issued. Counsel for Giants then stated: "[J]ust to clarify the record. . . . [Giants has] submitted declarations refuting [the \$83,940.69 balance due] and [completed] calculations based on Foto-Kem's own price list." The trial court stated: "You are going to be arguing that at the time of the hearing. This is simply a writ which precedes a hearing on the merits of the claim. It's this court's observation that's been satisfied. [¶] . . . [¶] Argue about the amount, if you wish, at a later time. And if they are wrong in their calculations, that's why we have a bond"

Giants timely filed a notice of appeal.

DISCUSSION

Giants contends the trial court erred in granting the application for a right to attach order and issuing a writ of attachment, in that the trial court improperly refused to consider Giants's opposition to Foto-Kem's application, and Foto-Kem's claim was secured by an interest in Giants's films which were worth \$30 million. We disagree.



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Review of a trial court's determinations concerning the probable validity of a claim, and the amount to be secured by an attachment, are governed by the substantial evidence rule. (Lorber Industries v. Turbulence, Inc. (1985) 175 Cal.App.3d 532, 535.) However, when the record indicates the trial court did not weigh all relevant evidence, substantial evidence review does not apply. (Estate of Larson (1980) 106 Cal.App.3d 560, 567.)

"Attachment is a prejudgment remedy which requires a court to make a preliminary determination of the merits of a dispute. It allows a creditor who has applied for an attachment following the statutory guidelines and established a prima facie claim to have a debtor's assets seized and held until final adjudication at trial." (Lorber Industries v. Turbulence, Inc., supra, 175 Cal.App.3d at p. 535.)

Code of Civil Procedure section 484.090 provides in pertinent part: "(a) At the hearing [on the application for a right to attach order and order for issuance of writ of attachment], the court shall consider the showing made by the parties appearing and shall issue a right to attach order, which shall state the amount to be secured by the attachment determined by the court in accordance with [Code of Civil Procedure s]section 483.015 . . . if it finds all of the following: [¶] (1) The claim upon which the attachment is based is one upon which an attachment may be issued. [¶] (2) The plaintiff has established the probable validity of the claim upon which the attachment is based. [¶] (3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based. [¶] (4) The amount to be secured by the attachment is greater than zero. [¶] . . . [¶] (d) The court's determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of the additional evidence or points and authorities."

Code of Civil Procedure section 483.015 provides: "(a) Subject to subdivision (b) and to Section 483.020, the amount to be secured by an attachment is the sum of the following: [¶] (1) The amount of the defendant's indebtedness claimed by the plaintiff. [¶] (2) Any additional amount included by the court under Section 482.110 [costs and attorney fees]. [¶] (b) The amount described in subdivision (a) shall be reduced by the sum of the following: [¶] (1) The amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable. [¶] (2) The amount of any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint filed in the action if the defendant's claim is one upon which an attachment could be issued. [¶] (3) The amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations. [¶] (4) The value of any security interest in the property of the defendant held by the plaintiff to secure the defendant's indebtedness claimed by the plaintiff, together with the amount by which the value of the security interest has decreased due to the act of the plaintiff or a prior holder of the security interest." "`Security interest' means `security interest' as defined in Section 1201 of the Commercial Code." (Code Civ. Proc., § 481.223.) Commercial Code, section 1201, subdivision (36)(a) provides: "`Security interest' means an interest in



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personal property or fixtures that secures payment or performance of an obligation."

"If the defendant desires to oppose the issuance of the right to attach order sought by plaintiff or objects to the amount sought by plaintiff or objects to the amount sought to be secured by the attachment, the defendant shall file and serve upon the plaintiff no later than five court days prior to the date set for the hearing a notice of opposition. The notice shall state the grounds on which the defendant opposes the issuance of the order or objects to the amount sought to be secured by the attachment and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. If the defendant fails to file a notice of opposition within the time prescribed, the defendant shall not be permitted to oppose the issuance of the order." (Code Civ. Proc., § 484.060, subd. (a).)

Giants claims the trial court refused to consider its opposition to the writ of attachment on the ground the opposition had been untimely filed. Giants has mischaracterized the record.² There is nothing in the record to indicate the trial court refused to consider Giants's opposition. Neither the minute order of December 14, 2001, nor the reporter's transcript of the hearing of that date, indicate the trial court refused to consider Giants's opposition. Indeed, the record suggests that the trial court considered the opposition papers: at the hearing, the trial court referred to the allegation in Dadon's declaration in opposition that Foto-Kem refused to release the master negatives to nine of Giants's films. The trial court's statement to counsel that Giants could contest Foto-Kem's calculations at the hearing on the merits simply reflects that a right to attach order and order issuing a writ of attachment is not a determination on the merits.

Assuming the trial court considered Giants's declarations in opposition as well as Foto-Kem's declarations, substantial evidence supports the right to attach order and order issuing the writ of attachment.³ The contract documents and statements of account attached to Cottone's declaration constitute substantial evidence Foto-Kem's claim in the amount of \$83,940.69 was probably valid. Supported only by his own assertion, Dadon's opinion that the films Foto-Kem held were worth \$30 million was unsubstantiated and speculative.⁴ On the record before it, the trial court was entitled to reject Dadon's opinion that Foto-Kem's claim was adequately secured by its lien on Giants's films.

Even if the trial court had refused to consider Giants's opposition, we would conclude the trial court's refusal was proper. Code of Civil Procedure section 484.060, subdivision (a) prohibits a trial court from considering late-filed opposition. Giants did not seek relief from the consequences of its tardiness. Giants made no effort to show good cause as to why the trial court should consider Giants's declarations at the hearing or continue the hearing. Nor does Giants provide any justification on appeal for its tardiness. Foto-Kem demonstrated a prima facie case for issuance of a right to attach order and order for issuance of a writ of attachment. Therefore, based on the information before it, the trial court properly issued the writ of attachment.

DISPOSITION



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The order is affirmed. Foto-Kem is awarded its costs on appeal.

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We concur:

TURNER, P. J.

MOSK, J.

1. In the meantime, Giants sued Foto- Kem in a separate action.
2. In its respondent's brief, Foto- Kem agreed the trial court had properly refused to consider the untimely opposition. We advised all counsel the record did not support a conclusion that the trial court had refused to consider Giants's opposition papers. We permitted supplemental briefing.
3. Of course, if the opposition were disregarded, a fortiori, the trial court's order is supported by substantial evidence.
4. It is not clear that the negatives had any market value or Foto-Kem was entitled to sell the negatives. Foto- Kem established the probable value of the claim. It was Giants's burden to establish the amount of any reduction. (See Code Civ. Proc., §§ 483.015, 484.060.) Giants did not claim in the trial court that Foto- Kem was required to establish that the negatives had no value. If Giants had timely objected, Foto- Kem would have had the opportunity to cure any deficiency.

