

**Ohara v. Kim**

Cal.App. 2 Dist., 2007.

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Court of Appeal, Second District, Division 2,
 California.

Sunny **OHARA**, Plaintiff and Appellant,
 v.

Mi Jeong **KIM** et al., Defendants and Respondents.
No. B187700.

(Los Angeles County Super. Ct. No. BC309462).

May 2, 2007.

APPEAL from a judgment of the Superior Court of Los Angeles County. [Joseph R. Kalin](#), Judge. Affirmed.

Walsh & Walsh, [Douglas L. Walsh](#) and Suzanne E. Walsh for Plaintiff and Appellant.

Law Offices of Baird A. Brown and [Baird Brown](#) for Defendants and Respondents.

[DOI TODD](#), J.

*1 Plaintiff Sunny Ohara appeals from the judgment in favor of defendants Mi Jeong Kim and Yong Whan Kim following a court trial. Appellant essentially contends the evidence does not support the court's findings that respondents did not fraudulently induce her to buy their Cold Stone Creamery business through misrepresentations regarding the profitability of the business and that the business was operated by its employees.

The trial court expressly found no material misrepresentations were made by respondents to appellant. The record contains overwhelming evidence to support this finding and the court's further finding that appellant did not rely on any representations by respondents as to past profits of the business or the operation of the business by its employees. We affirm the judgment.

BACKGROUND***Factual Summary***

On June 29, 2002, respondents, as co-owners, opened a new Cold Stone Creamery business in Newbury Park, California. Ordinarily, a new owner of such a business was required to train with Cold Stone Creamery, Inc., the franchisor. But Yong obtained his training instead at the Cold Stone Creamery in Thousand Oaks, which was owned by Mi Jeong, his sister-in-law. Yong was the "true owner and operator of" the Newbury Park store, and Mi Jeong was an owner in name only. She was named a co-owner because only someone who already owned such a business could open a new store.

About October 24, 2002, Yong listed the business for sale with Bee Investment, Inc., through its agent Jae Seung Noh. When Noh stated that it seemed the monthly net income would be about \$8,000 to \$9,000, based on information Yong had supplied Noh, Yong responded "maybe so."

On January 3, 2002, advertisements were placed by John Yi, also a Bee agent, in two Korean language newspapers stating the business income was \$10,000 plus and that it was run by employees.

On January 25, 2003, respondents entered into a new listing agreement with Yi. Yi had told Yong the original \$480,000 asking price was a "little high" and asked if he could make it \$390,000, which "would be reasonable and good." Yong agreed.

Advertisements placed by Yi in the same newspapers on January 27, 2003 reflected the business income was \$8,000 plus and that it was run by employees.

After reading Yi's initial advertisements, appellant spoke with Yi, who told her the store was operated entirely by employees and "they don't have the owner there." "She later noticed the advertised income had changed from \$10,000 to \$8,000 plus per month. Prior to January 14, 2003, she visited the store four or five times.

On January 14, 2003, appellant entered into a purchase agreement with respondents for the asking price of \$390,000. Yi represented both respondents and appellant in the transaction. Appellant considered

Yi to be her agent as well as respondents.'

About February 3, 2003, escrow was opened. Appellant and Manfred Rah, her life partner and an accountant, were listed as the purchasers.

*2 Paragraph 15 of the escrow agreement stated that respondents were to provide the original books and records of the business and that respondents represented to appellant that these books and records were those maintained in the ordinary and normal course of the business. Paragraph 15 further provided that the purchase was contingent on appellant's approval of these books and records.

Appellant never asked Yong or Mi Jeong for any records. However, she asked Yi more than five times for records after Yong provided a balance sheet, a computer-printed weekly sales statement and a profit and loss statement to Yi, who forwarded these items to appellant.

The profit and loss statement for the period of July through December 2002 was prepared "overnight" by Yong on January 24, 2003, at Yi's urgent request. The statement was based on the checks written and expenses. Yong was unsure how to prepare the document, and at Yi's suggestion followed the form used for the recent sale of another store. According to the statement, the average monthly net income for this six-month period was about \$5,390 (i.e., \$32,337.18 divided by six months). Appellant reviewed the profit and loss statement prior to close of escrow.

In his discussion with appellant regarding this profit and loss statement, Yi guaranteed its accuracy as to business operations. However, Yi explained orally and in writing that the \$32,337.18 net income figure for the six-month period arrived at by Yong should be increased by: (1) \$5,500, which represented Yong's salary; (2) \$9,162 as interest on a small business administration loan; (3) \$3,200 for depreciation; and (4) amortization of \$678.99. He advised appellant that when this net of \$50,878.17 was divided by six, the actual average monthly net income was \$8,479.70.

By the middle of April 2003, appellant had visited the business about 15 to 17 times. She did not see respondents there on any of these occasions. On April 16, she asked for the owner. Yong came out from a back room, and appellant introduced herself as the buyer.

The sale was contingent on approval of the franchisor and lease of the business premises. Prior to close of escrow, the franchisor approved appellant as a successor franchisee, and appellant entered into a franchise agreement with the franchisor and a sublease for the business premises.

Also prior to close of escrow, appellant had 11 days of training at the franchisor's Arizona facility. She learned how to serve customers, clean the store, order food products and how to make a profit. Although the profit and loss statement indicated the cost of goods was about 18 percent of income, appellant learned during training that the cost could be expected to be about 25 percent. The franchisor, but not the franchisee, would negotiate with the supplier regarding the prices for these goods. The instructor also advised that if the store were operated by a manager working under the owner, the cost of labor would be about 25 percent more.

*3 Rah declined to go through with the purchase, and appellant completed the purchase by herself. Escrow closed on April 30, 2003.

From May 1, 2003, when appellant began operating the business, through December 31, 2003, she had an average monthly net profit of \$3,300.

On September 2, 2003 appellant listed the business for sale at \$430,000. She informed the broker that \$7,500 was the net monthly income during the summer.

About October 16, 2003, appellant's attorneys gave respondents written notice that she was rescinding the purchase agreement based on "material misrepresentations" that the business expenses were "less than actually experienced" which led to "the resulting overstatement of the net income received." Respondents did not agree to the rescission demand.

Procedural Summary

On January 23, 2004, appellant filed a complaint against respondents for fraud (sixth cause of action) and rescission based on fraud (seventh cause of action).^{[FNI](#)}

^{[FNI](#)} In this seven count complaint, the first through five causes of action were against Bee Investment, Inc., and Yi. These two defendants settled with appellant prior to

trial.

Respondents separately answered by generally denying the material allegations of the complaint and asserting the same 10 affirmative defenses.

Following trial, the trial court issued its statement of decision. The court made these relevant findings and conclusions. Prior to purchasing the franchise business, appellant visited the store, observed the business, its employees and patrons and she had read and considered the financial information respondents provided her. The gross income provided appellant by respondents was “not in dispute as it was computer generated by sales information transmitted from the cash registers directly to the franchisor. The purchases of supplies were also generated by the supplier. All supplies were required to be purch[ha]sed from a company named [Sysco].”

“Prior to the close of escrow, [appellant] spent 11 working days in a training session conducted by Coldstone Creamery in Arizona which covered such areas as financial facts of running the business and costs of labor, food and management and hands on working in an operating store.” Also, “[p]rior to purchasing this franchise, [appellant] owned and operated and sold several prior businesses. She had the benefit of the advi[ce] of an accountant who originally was going to be a partner in the business.”

On the issue of profits, the trial court found: “It was difficult to predict the profitability of the business in th[at] [respondents] operated the business for only about 7 months before its sale to [appellant]. It would have been necessary to speculate as to the profitability of the business in that the business was in the start up stages and sales were seasonal. However, during the operation of the business by both [appellant] and [respondents], the business was profitable. [Appellant] claims, however, that she was fraudulently misled as to the past and future profitability of the franchise.”

The trial court rejected appellant's fraud in the inducement theory based on her claim that “she was led to assume in entering into the sales agreement a certain level of monthly net profits and that the business could be run by the employees.”

*4 The court explained that appellant was foreclosed from relying on any such alleged representations, because “[t]he parties in opening the escrow signed an Integrated Agreement which provided for a review of business records by [appellant], that the

Agreement constituted the entire contract, that there were no oral representations outside of the written contract and all prior agreements were merged into the contract.” “The Court finds the final agreement superseded all prior negotiations and/or representations. That [respondents] did not represent and/or guarantee \$8,000.00 per month net income but only that this was possible future income. That the agreement stated ‘that representations of profits are future.’ “

As an alternative ground, the court found respondents “did not make any materially false statements in inducing [appellant] to purchase the franchise, that [appellant] independently factually investigated the business and did not rely on [respondents'] representations.” The court did not credit the testimony of appellant's accounting expert that “the sales price of the store should have been \$179,557.32. That [appellant] overpaid for the store when purchasing the franchise for \$350,000.00.” The court found that such testimony was “inconsistent with [appellant] having subsequently listed the franchise for sale for \$430,000.00.” ^{FN2}

^{FN2}. “On appeal, we review the trial court's ruling, not the reasons given for it. If the ruling is correct, it will be affirmed even if it was reached by a mistaken line of reasoning. [Citation.]” (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 547.) “ [A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.’ [Citation.]” (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

In this instance, we affirm the judgment based on the existence of substantial evidence to support the trial court's findings that respondents made no false material representations to appellant and that she did not rely on any representations made by respondents. This disposition obviates the need to address appellant's challenges to the trial court's findings that appellant dealt directly with the broker; it would have been difficult to predict profitability; the business was profitable; and appellant's claim was that she was fraudulently misled as to past and future profitability of the franchise.

On September 23, 2005, judgment was entered in favor of respondents and against appellant. This appeal followed.

STANDARD OF REVIEW

“In assessing the sufficiency of the evidence, we must view the evidence in the light most favorable to the judgment, drawing all reasonable inferences and disregarding all contradictory evidence. ([Campbell v. Southern Pacific Co.](#) (1978) 22 Cal.3d 51, 60.)” ([Continental Airlines, Inc. v. McDonnell Douglas Corp.](#) (1989) 216 Cal.App.3d 388, 425.)

“Questions as to the credibility of witnesses and the weight to be given their testimony are for the trier of the facts.” ([Hansen v. Bear Film Company, Inc.](#) (1946) 28 Cal.2d 154, 184.) It is the province of the trier of fact to believe or disbelieve in part or in whole the testimony of a witness in the face of impeaching evidence, such as giving “credence to a witness who has falsely testified in part [citation], or whose testimony contains contradictions or inconsistencies. [Citation.] An appellate court is not concerned with the question of the preponderance of the evidence but with the single inquiry whether the record contains substantial evidence tending to support the findings assailed. [Citations.]” (*ibid.*; see also, [Gonzales v. Gonzales](#) (1968) 267 Cal.App.2d 428, 432.)

“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.)

DISCUSSION

I. Abundant Evidence of No Material Representations

*5 In its statement of decision, the trial court found respondents “did not make any materially false statements in inducing [appellant] to purchase the franchise, that [appellant] independently factually investigated the business and did not rely on [respondents'] representations.” The record reveals abundant evidence to sustain these findings.

A. No Representation Made by Mi Jeong Kim Shown

Initially, we point out it is uncontroverted that respondent Mi Jeong Kim had nothing to do with the contents of the profit and loss statement that contained a statement giving rise to an inference of a net monthly income of about \$5,390 over a six-month period, nor does appellant claim that prior to the close of escrow ^{FN3} Mi Jeong Kim had made any representation to her about the accuracy of the profit and loss statement or any of its contents.

^{FN3}. At trial, appellant testified that Mi Jeong came to see her at the store after receiving a copy of the rescission letter. Mi Jeong told appellant that she sent the profit and loss statement to Yi, and that the statement was inaccurate regarding the cost of labor and food. Mi Jeong contradicted appellant. She testified that she was not the one who provided the statement. Rather, the fax line on the profit and loss statement belonged to Yong. She further denied having any discussion at that time with appellant about the profit and loss statement, including its accuracy. She denied ever telling appellant that the latter paid too much for the business.

Additionally, appellant does not claim Mi Jeong Kim represented to her that the business was run by employees. Rather, appellant simply asserts: “[J]ust prior to the closing of escrow in April 2003, [appellant] visited [respondent] YONG WHAN KIM and asked him, in person, what the store's average net profit was and whether it was being run by the employees. [He] responded that the average net profit was over \$8,000.00 per month and was indeed run by the employees.”

There thus was ample evidence to support the trial court's implied findings that Mi Jeong Kim made no representation to appellant regarding the monthly net

profit statement in the profit and loss statement or that she made any oral representations to appellant about its monthly net profits or the business being run by employees.

B. No Material Representations Made by Yong Whan Kim

Appellant contends that she was induced to enter into the purchase of the ice cream business based on representations by respondent Yong Whan Kim that the monthly net profits of the business was about \$8,000 and that the business was run by its employees. The record contains ample evidence to support the trial court's findings that Yong Whan Kim did not make any materially false statements.

1. No Material Representations About Earned Profits

The purchase agreement conditioned the sale of the business on the buyer's approval of the last six months gross sales of \$160,000 (July 2002-December 2002). In her brief, appellant concedes that the \$160,000 figure is accurate.

The escrow instructions and agreement (Escrow Agreement) provided that it was "understood and agreed that the Buyer has made his own independent investigation of the subject business, has satisfied himself with his ability to conduct the same, and is now purchasing the said business with the clear and distinct understanding and agreement that *all profits are future, to be arrived at from his own resources and labors.*" Regarding profits, the Escrow Agreement further provided: "[t]he Buyer herein has personally inspected this business and has satisfied himself with his ability to conduct same, and *hereby purchases said business with a clear and distinct understanding that all profits are future.*"

*6 At trial, Yong testified that about January 24, 2003, Yi called and stated he needed a profit and loss statement "that same day." It took Yong overnight to prepare the profit and loss statement, and he faxed it to Yi the next day. Yong testified he was not a "C.P.A" and had been unfamiliar with a "cash disbursements journal" or "cash receipts journal." He did not know what a "general ledger" was and had never used it before, nor did he know how to use any computer accounting products, including "Quicken" or "Quick Books" in conjunction with the business. Yong was not sure how to prepare a profit and loss statement and simply followed the form used for a

Stone Cold Creamery store that had been sold earlier. He prepared the statement by himself from canceled checks and expense information.

The average monthly net income for the six-month period reflected in the profit and loss statement was approximately \$5,390. Whether this figure was accurate or not is of no moment. Appellant did not testify that she relied on this figure as the correct average monthly net income. Rather, she relied on Yi's figure of \$8,479.70, which Yi arrived at by dividing six into \$50,878.17, which augmented total net income for the six-month period he had calculated by adding four additional amounts to the original total net income of \$32,337.18 in Yong's profit and loss statement. Accordingly, appellant did not rely on Yong's representation of the average monthly net income figure in the profit and loss statement.

There is also ample evidence to support the trial court's implied finding that Yong did not represent to appellant that his average monthly net profit was \$8,000 plus. Appellant testified that on a single occasion in April prior to close of escrow, she personally encountered Yong at the business. She asked him, "What is the average net income so far at this point; average income." He responded, "\$8,000-plus average net income" per month. Yong, however, testified that at this meeting, appellant asked him about the next monthly income during the summer, and he replied, "[A]t least 7 to \$8,000." Appellant acknowledged at trial that the business was seasonal and that the peak season was in July and August while the worst months were November, December, and January.

Additionally, appellant's own testimony at trial belied her claimed reliance on net profits for the valuation of a business. In her opening brief, appellant acknowledges that she is a well-educated, experienced businesswoman who, over a span of twenty years, had owned and operated five different businesses, namely, a women's apparel store, a check cashing business, a coffee shop, a restaurant, and a therapy spa. At trial, appellant testified that when she sold the restaurant, it was valued at one year of its annual sales, and its value had nothing to do with profit, just sales. When she sold the coffeehouse in 2002, its value was about 1.25 times its annual sales.

2. No Material Representations Regarding Employee Run Business

*7 The trial court impliedly found that any representation Yong made regarding the business being run by employees was not material. The record contains substantial evidence to support this finding.

Appellant testified that during her visits to the business before the close of escrow, she never saw Yong in the store. Rather, at their only person-to-person meeting prior to close of escrow, Yong appeared from a back room of the store. As they spoke, she asked Yong “ ‘Is this store running by entirely employees, offset of ownership [sic]?’ ” Yong responded, “ ‘Yes.’ ”

Yong was not asked about this conversation, nor did he testify at trial that he did or did not tell appellant that the store was run entirely by the employees. He did testify that from the time the store opened until December 31, 2002, he worked at the store about 40 to 50 hours a week. In January, 2003, he had about 15 employees but the number varied with the season, which could be from about 15 up to 22. He further testified that he personally managed the store but of these employees “there was a person named crew leader,” who “was an employee who managed the other employees at the same time as doing the same tasks as the other employees. He had little more duties and responsibilities than the other employees.”

Yong’s description of how the store was operated by the employees is consistent with a representation that the store was run entirely by the employees in the sense of the day-to-day operation of the business and with what appellant herself observed during her many personal visits to the store.

Additionally, appellant could not have justifiably relied on a representation that the store was run entirely by the employees without supervision either by the owner or a manager acting as the owner.^{FN4}

^{FN4}. Although appellant testified that she had been looking for a business run by employees only, she admitted that in the first store she had owned, a dress shop, she had one employee but also worked in the business; that in her check-cashing business, she had no employees and worked by herself; that a manager she had hired and employees worked the coffeehouse she had owned; and that in the restaurant she owned, she would talk to the manager but not the other employees and picked up the money. As for her spa business, she had eight

employees which she would supervise once or twice a week for one or two hours.

On February 28, 2003, a date prior to close of escrow, appellant signed the franchise agreement for the ice cream business. In pertinent part, appellant, as the franchisee, expressly agreed that “The Franchised Business must be (a) personally supervised by Franchisee or by a Principal or (b) directly supervised ‘on-premises’ by a manager who has satisfactorily completed Franchisor’s Training Program, unless Franchisor has waived that requirement. If supervised by a manager, the manager must spend at least 40 hours per week on the premises of the Franchised Business overseeing the operation of the Franchised Business.”

Appellant admitted at trial that during her training in Arizona, the instructor discussed how franchises were run, namely, some directly by the owner and others by a manager who reported to the owner. She testified that she understood that the business she was about to buy was run totally by employees, which included a manager, but she also knew “the owner was there.” When asked if she knew in March 2003 who the manager of the business was, she responded, “I don’t know. One of the employees [was] the manager.” She admitted that while in Arizona during training, she thought she was buying a franchise where there was a manager who was going to report to her, the owner. Prior to close of escrow, it was her intent to hire a manager for the business. However, she believed that at first she probably would have to run and supervise the business.

DISPOSITION

*8 The judgment is affirmed. Respondents shall recover costs on appeal.

We concur: [BOREN](#), P.J., and [CHAVEZ](#), J.
Cal.App. 2 Dist., 2007.
Ohara v. Kim
Not Reported in Cal.Rptr.3d, 2007 WL 1267643
(Cal.App. 2 Dist.)

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