Filed 2/20/19

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ARTASHES AMBARTSUMYAN, Plaintiff, Cross-defendant, and Respondent, v. EHAB ATALLA et al., Defendants, Cross-complainants, and Appellants.	D074704 (Super. Ct. No. CIVDS1401393)

CONSOLIDATED APPEALS from a judgment of the Superior Court of San Bernardino County, David Cohn, Judge. Affirmed in part; reversed in part with directions.

Law Office of Bruce Adelstein and Bruce Adelstein; Rosman & Germain and Daniel L. Germain, for Defendants, Cross-complainants, and Appellants.

Papazian Law and Armen F. Papazian; StilesPomeroy and Michael J. Stiles, for Plaintiff, Cross-defendant, and Respondent.

Plaintiff and cross-defendant Artashes Ambartsumyan agreed to lease a truck stop complex in Colton, California from defendants and cross-complainants Ehab Atalla, Atef Hanna, and Minas Corporation.[1] The truck stop included, among other things, two underground storage tanks (USTs) supporting a number of diesel dispensers (or "pumps") and another UST supporting a gasoline dispenser. A number of years into the lease, a series of disputes arose between Ambartsumyan and the lessors regarding Ambartsumyan's desire to temporarily, and later permanently, stop selling gasoline at the truck stop. To continue selling gasoline, Ambartsumyan would have to upgrade the gasoline UST's vapor recovery system to meet new regulatory requirements. Instead of making this costly upgrade, Ambartsumyan intended to convert the gasoline dispenser and UST to diesel fuel, which would not be subject to the same requirements. The lessors did not want this conversion. They blocked Ambartsumyan's attempt to alter the status of the gasoline dispenser and UST. After local authorities threatened enforcement action, the lessors organized and paid for the upgrade to the truck stop's gasoline dispensers.

Ambartsumyan sued Atalla, Hanna, and Minas for breach of contract, breach of the implied covenant of good faith and fair dealing, and other claims. The lessors likewise sued Ambartsumyan for breach of contract and other claims. The lessors also brought an unlawful detainer action. Following trial, as relevant here, the jury found in

---

[1] The parties stipulated at trial that Hanna, Atalla, and Minas were "one and the same" for purposes of the litigation. We refer to them collectively as the "lessors" where convenient.

Ambartsumyan's favor on his claims for breach of contract and breach of the implied covenant of good faith and fair dealing. It awarded him $96,000 in economic damages. The jury rejected the lessors' breach of contract claim. The trial court found Ambartsumyan to be the prevailing party and awarded him attorney fees and costs.

Atalla, Hanna, and Minas appeal. They appear to contend (1) the evidence does not support the jury's finding that they breached the lease agreement, (2) the evidence does not support the jury's finding that they breached the covenant of good faith and fair dealing, (3) the evidence does not support the jury's damages award, (4) the evidence compelled a finding in the lessors' favor on their cross-claim for breach of contract, and (5) the lessors are the prevailing parties as a matter of law.

We conclude that the evidence supports the jury's finding of breach of the implied covenant of good faith and fair dealing, but it does not support the jury's finding of breach of contract or the jury's damages award. As to the lessors' claim for breach of contract, we conclude they have not shown the evidence compelled a finding in their favor. We therefore reverse the judgment with directions to enter judgment in the lessors' favor on Ambartsumyan's claim for breach of contract but conduct a partial new trial on Ambartsumyan's damages for breach of the implied covenant of good faith and fair dealing. After the new trial is concluded, the trial court shall reconsider the prevailing party issue and enter a new judgment accordingly.

FACTUAL AND PROCEDURAL BACKGROUND

"As required by the rules of appellate procedure, we state the facts in the light most favorable to the judgment." (*Orthopedic Systems, Inc. v. Schlein* (2011)

202 Cal.App.4th 529, 532, fn. 1.) Additional facts will be discussed where relevant in the following section.

In 2003, Ambartsumyan entered into a commercial lease agreement with Atalla and Hanna to lease the truck stop complex, including the USTs and fuel dispensers. Ambartsumyan agreed to limit the truck stop's operations only to certain "Agreed Use[s]" under the agreement, which it defined as "[r]etail sales of motor fuel, operation of a convenience store, food sales, truck weighing, truck washing, and any other lawful use related thereto." The agreement specified, "Lessee shall use and occupy the Premises only for the Agreed Use, or any other legal use which is reasonably comparable thereto, and for no other purpose. . . . Lessor shall not unreasonably withhold or delay its consent to any written request for a modification of the Agreed Use, so long as the same will not impair the structural integrity of the improvements on the Premises or the mechanical or electrical systems therein [and] is not significantly more burdensome to the Premises."

Ambartsumyan agreed to comply, at his own expense, with all applicable laws, building codes, regulations, and ordinances. He also agreed to keep the truck stop, including the USTs and fuel dispensers, in good order, condition, and repair.

With certain exceptions, the lease agreement required Ambartsumyan to obtain the lessors' consent to alter or modify the improvements on the truck stop property. It stated, "Lessee shall not make any Alterations or Utility Installations to the Premises without Lessor's prior written consent." The agreement defined "Alterations" as "any modification of the improvements, other than Utility Installations or Trade Fixtures, whether by addition or deletion." "Utility Installations" are "all floor and window

coverings, air lines, power panels, electrical distribution, security and fire protection systems, communication systems, lighting fixtures, HVAC equipment, plumbing, and fencing in or on the Premises." The lease agreement did not require the lessors' consent for "non-structural Utility Installations to the interior of the Premises (excluding the roof) . . . as long as they are not visible from the outside, do not involve puncturing, relocating or removing the roof or any existing walls, and the cumulative cost" did not exceed a certain threshold. For such Utility Installations, only notice to the lessors was required.

The truck stop consisted of six one-way fueling lanes, a convenience store, a restaurant, and other amenities. The fueling lanes were numbered 1 through 6 and separated by islands containing the fuel dispensers. Lane 1 ran directly along the convenience store and was limited to cars only. On the island directly opposite the convenience store, a dual-nozzle gasoline dispenser and a single diesel dispenser served lane 1. The remaining lanes ran between islands and were for diesel fueling only. Lanes 2 through 6 had dispensers on both sides, which allowed large trucks to fill two tanks simultaneously.

The diesel dispensers were served by two 20,000-gallon USTs. The gasoline dispenser was served by a single 10,000-gallon UST. Fuel cannot be transferred between the USTs. Although the lessors retained ownership of the USTs, Ambartsumyan was responsible for their maintenance and regulatory compliance under the lease agreement. The USTs and associated fixtures were regularly inspected by the San Bernardino County Fire Department.

Six years into the lease, in June 2009, the South Coast Air Quality Management District (AQMD) notified Ambartsumyan that he must comply with AQMD Rule 461, which generally required gasoline dispensing stations to upgrade their vapor recovery systems. The cost to upgrade the truck stop's gasoline dispenser would have been approximately $30,000 to $45,000. (Ambartsumyan's monthly rent at the time was $25,000.) In response to the notice, Ambartsumyan wrapped yellow caution tape around the gasoline dispenser and stopped selling gasoline. Approximately 400 gallons of fuel remained in the gasoline UST.

At the next annual fire department inspection, in January 2010, the inspector observed that the gasoline UST was no longer in use and the dispenser was taped off. The inspector noted that Ambartsumyan had three options for the UST: (1) upgrade the vapor recovery system and put the UST back into service, (2) convert the UST to diesel (which did not require a vapor recovery system upgrade), or (3) remove the UST. In April 2011, the fire department inspector again noted that the gasoline UST had been taken out of service.

At the June 2012 annual inspection, the fire department inspector issued Ambartsumyan a violation for failing to properly close a UST. The inspector wrote, "The Owner/Operator must file for temporary closure status for the [gasoline] tank within 30 days or a UST removal order will be issued. The [gasoline] tank currently does not meet current [operability] requirements and continued non-compliance will result in the assessment of penalties not to exceed $5,000 per day/per violation." The inspector noted that Ambartsumyan "stated [his] desire to convert the tank to diesel in lieu of upgrading

to meet [upgraded vapor recovery system] requirements. Should the decision be made to convert the tank, immediately contact the Department and submit formal plans for review. A UST Modification permit will be required prior to any change." The inspector set a July 4, 2012 deadline for compliance.

A year later, in June 2013, the fire department inspector issued Ambartsumyan another violation for failing to properly close the UST. Ambartsumyan was directed to submit an application for temporary closure of the UST within seven days. The inspector wrote, "Due to the repeated and recalcitrant nature of this violation, continued non-compliance will result in red tag application and the assessment of daily penalties." (Some capitalization omitted.)

Ambartsumyan submitted the required UST temporary closure application. He listed Hanna as the UST owner and himself as the operator. As the reason for the application, Ambartsumyan wrote, "Operator needs time to weigh options to either convert tank to diesel or upgrade current gasoline [UST] to air quality regulations."[2]

Three months later, the fire department sent Hanna a letter describing the conditional approval of Ambartsumyan's UST temporary closure application. Hanna and Atalla responded by letter to the fire department. They stated that they were the owners of the UST and they "emphatically do not authorize or consent to the temporary closure

---

2 Ambartsumyan had recently reached an agreement to sell the truck stop business for $1.6 million. He believed the temporary closure of the UST would allow the buyers of the business to decide whether they wanted to upgrade the gasoline dispenser or convert the UST to diesel. The sale was not completed.

of any on-site UST. Further, any related activities concerning the [truck stop] site cannot commence without the express[] written permission of this ownership group." They named an agent, Michael Morgan, to represent them in connection with the UST closure issue.

Morgan reiterated the lessors' objection in an email to the fire department. A fire department official, Jose May, noted that there "appears to be a disconnect in the information this Agency is receiving with respect to the responsible party of the [USTs]. Please advise [the lessors] to communicate with the operator of [the truck stop] and provide this Agency with a written Owner/Operator Agreement. [¶] Pending the above action, this Agency will enforce the conditions of the Temporary Closure per the application received and approved." Morgan responded, "I want to express to all parties that the property owners, the party that currently owns the USTs, does not want the Temporary UST Closure permit activities to commence and any activities toward that temporary closure would be done without their express[] permission or consent."

Ambartsumyan retained an attorney, who wrote to Atalla and requested that the lessors sign an enclosed blank Owner/Operator Agreement form prepared by the fire department. The attorney explained that Ambartsumyan was required by the fire department to submit the Owner/Operator Agreement because he was the operator, and not the owner, of the USTs. The Owner/Operator Agreement memorializes the operator's

commitment to monitor the UST in accordance with applicable law.[3] The lessors did not sign the agreement.

Two months later, the fire department wrote to Hanna, with a copy to Ambartsumyan, informing him that the department's conditional approval for the temporary closure of the gasoline UST had expired. The fire department explained, "Compliance with the conditions for Temporary Closure was not met at the request of the property owner," based on the lessors' correspondence informing the fire department that the lessors did not consent to the temporary closure. The fire department told Hanna that Ambartsumyan requested a UST modification permit to convert the UST to diesel, but the department would not consider it without the lessors' consent. The fire department noted that, based on the lessors' correspondence, it would consider the lessors responsible for all requirements related to ownership and operation of the USTs at the truck stop. It noted that the lessors must submit an Owner/Operator Agreement and comply with all applicable laws.

Hanna later testified that he knew, based on the fire department's correspondence, that it would not take any action on Ambartsumyan's requests. He was happy with that

---

[3] The authority for this requirement is Health and Safety Code section 25284, subdivision (a)(3)(A). That subdivision requires a person holding a UST permit, who is not the operator of the UST, to "[e]nter into a written agreement with the operator of the tank to monitor the tank system as set forth in the permit." (*Ibid.*) It appears that the fire department did not previously require an Owner/Operator Agreement because it believed Ambartsumyan to be the owner or permitholder for the USTs. But, in reality, the lessors held the UST permit. In any event, as a fire department official testified, both owners and operators are responsible for complying with the statutes and regulations governing a UST, regardless whether the owner is also operating the UST.

outcome. He admitted that the lessors were blocking Ambartsumyan from resolving the very issues the lessors identified as defaults under the lease agreement.

Ambartsumyan's attorney wrote to the lessors to inform them that his efforts to comply with the fire department's directives "have been thwarted by [the lessors'] actions, which have now risked the operational status of the truck stop as a whole." The attorney reiterated Ambartsumyan's request that the lessors sign the Owner/Operator Agreement and informed the lessors that their actions constituted a breach of the lease agreement. Two months later, Ambartsumyan filed this lawsuit.

In March 2014, the fire department issued a notice of significant violation and affixed a red tag to the gasoline UST system based on the unlawful abandonment or closing of the UST. The notice ordered the lessors to "[o]btain a permit from this Department to remove the unlawfully closed UST and to conduct a site assessment to determine whether there has been an unauthorized release into the soil and/or groundwater." The next annual inspection, in June 2014, noted that the red tag issue had not been resolved. The inspector issued another violation for failure to correct past UST violations. He also issued a violation for failure to submit an Owner/Operator Agreement to the fire department. Soon thereafter, the lessors filed their cross-complaint.

Attorneys for Ambartsumyan and the lessors exchanged dueling Owner/Operator Agreements. Ambartsumyan signed the fire department's form agreement, with the lessors' names stated as the agreeing parties. The lessors suggested a modified agreement, which added the following language: "Nothing in this Agreement shall authorize the Operator to modify, close or otherwise change any aspect of the [UST]

systems located on the subject property . . . without the prior express written consent of the Owners." The lessors identified Ambartsumyan as the agreeing party. Ambartsumyan rejected the lessors' additional language restricting his ability to "modify, close or otherwise change any aspect of the [UST] systems" as inconsistent with his interpretation of the lease agreement.[4]

The lessors sought and obtained approval from the fire department to upgrade the vapor recovery system on the gasoline UST, which would bring it into compliance with AQMD regulations. Ambartsumyan objected. He told the lessors that the work was unnecessary because he wanted to have the UST converted to handle diesel fuel. Ambartsumyan was willing to pay for the diesel conversion, but not the gasoline upgrade. He believed that car traffic in lane 1 interfered with truck traffic and that he would make more money on diesel sales to trucks. The lessors responded with concerns over the safety of truck traffic in that lane, which was nearest to the convenience store. They also thought converting the gasoline UST to diesel would harm the value of the truck stop.

Ultimately the lessors moved forward with the upgrade work, which was completed in late 2014. The lessors then demanded reimbursement from Ambartsumyan for the cost of the upgrade, approximately $73,000. After the upgrade, the fire

---

[4] The agreement language in both forms provided, in part, as follows: "In accordance with the requirement of California Health and Safety Code Chapter 6.7 Section 25284(a)2 I, _____, agree to comply with all regulations and requirements as set forth in the California Code of Regulations Title 23 Chapter 16, California Health and Safety Code Chapter 6.7, and as specified on the Underground Storage Tank permit for the facility."

department informed the lessors that the USTs were still in violation because an Owner/Operator Agreement had not been filed.

The lessors wrote to the fire department to "clarify" their prior correspondence. They confirmed they were the owners of the USTs, but they said, "we are not the operators of the [truck stop] and have no control over the underground fuel tanks and dispensers." They wrote, "Mr. Ambartsumyan is the operator of the [truck stop]—not us. Mr. Ambartsumyan should be the permit holder—not us." This clarification was discussed at a fire department inspection attended by Ambartsumyan and Morgan, the lessors' representative. It was agreed that Ambartsumyan was the UST operator and would be the primary permit holder.

After the inspection, Ambartsumyan informed the lessors that he intended to submit to the fire department his copy of the Owner/Operator Agreement (signed only by Ambartsumyan) to prevent further enforcement actions. The fire department accepted that copy, and it removed the red tag from the gasoline UST system. Ambartsumyan then submitted an application to modify the UST to handle diesel fuel. The fire department conditionally approved his application, but the work had not been performed by the time of trial.[5]

---

5 Ambartsumyan's application stated that the newly-converted diesel dispenser would use nozzles commonly used by cars, which dispense approximately 10 gallons of fuel per minute, rather than larger truck nozzles, which dispense approximately 60 gallons of fuel per minute.

Meanwhile, the litigation continued. The trial court held a multi-week jury trial to consider Ambartsumyan's claims for breach of contract and breach of the implied covenant of good faith and fair dealing, as well as the lessors' cross-claims for breach of contract and unlawful detainer. Several other claims, not relevant to this appeal, were resolved prior to trial by summary adjudication.

At trial, Ambartsumyan testified that the lessors' refusal to sign the form Owner/Operator Agreement damaged him because it prevented him from converting the gasoline UST to diesel. If he had been able to complete the conversion, Ambartsumyan believed, the truck stop would have been more profitable. He presented two theories of damages. Under the first theory, Ambartsumyan claimed that with the new diesel UST he would have been able to purchase more diesel fuel when prices were low. He would then be able to sell more fuel at lower cost, thus enjoying higher profits. Ambartsumyan did not provide an estimate of these higher profits. Under the second theory, Ambartsumyan claimed that the new diesel UST and dispenser would allow him to serve more truck customers and sell more diesel fuel than before. He testified that when the truck stop is busy ("two deep at every single lane"), some truck drivers might bypass his truck stop and buy diesel elsewhere. An additional diesel dispenser would alleviate some of the congestion and might prompt more trucks to stop and buy diesel. Ambartsumyan estimated that he would sell approximately 1,000 gallons more per day, resulting in lost profits of approximately $6,000 per month. This amount represents fewer than 10 additional truck customers per day. On cross-examination, Ambartsumyan

acknowledged he never ran out of diesel fuel or turned away truck customers for that reason.

Ambartsumyan testified he did not believe converting the gasoline UST to diesel would be an alteration or modification of the UST under the lease agreement. The work required to convert the UST was relatively minor, including changing the hoses, the nozzles, and several other components. The lessors, in their testimony, disagreed.

Numerous other witnesses testified, including a fire department official, UST consultants for both Ambartsumyan and the lessors, and an accounting expert retained by the lessors. Ambartsumyan did not retain an expert on the issue of damages.[6]

In his closing argument, Ambartsumyan's counsel argued that Ambartsumyan had been damaged because trucks passing on the freeway would not stop if they saw that the truck stop was too busy. Based on Ambartsumyan's testimony, his counsel requested an award of $6,000 per month starting in October 2013. He also mentioned that it would be "advantageous" for Ambartsumyan to be able to buy more diesel fuel when the price was low, but he did not quantify Ambartsumyan's damages based on that theory.

The jury found in favor of Ambartsumyan on his claim for breach of contract. In its special verdict, it answered "Yes" to the following question regarding breach: "Did the Landlords fail to sign the Owner/Operator Agreement, and thereby blocking [*sic*] Mr. Ambartsumyan from temporarily closing or converting the UST from gasoline to

---

6 The lessors moved for nonsuit on the issue of Ambartsumyan's damages. The trial court denied the motion. It explained, "There is evidence of damages, Mr. Ambartsumyan testified that in his opinion he is losing $6,000 a month."

diesel use?" The jury also found in favor of Ambartsumyan on his claim for breach of the implied covenant of good faith and fair dealing. It answered "Yes" to the following questions regarding this breach: (1) "Did the Landlords unfairly interfere with Artashes Ambartsumyan's right to receive the benefits of the lease by refusing to sign the Owner Operator Agreement?" (2) "Did the Landlords unfairly interfere with Artashes Ambartsumyan's right to receive the benefits of the lease by refusing to allow him to temporarily close or convert the gasoline UST to diesel use?" It awarded Ambartsumyan $96,000 in damages.[7]

The jury rejected the lessors' cross-claims. In particular, it answered "No" to the following question: "Is Artashes Ambartsumyan responsible under the Lease Agreement to reimburse the Landlords for the cost of upgrading the gasoline [UST] and associated fuel pump dispenser pursuant to Rule 461 of the South Coast Air Quality Management District?"

In bifurcated proceedings, the court rejected requests by Ambartsumyan and the lessors for injunctive and equitable relief. It determined that Ambartsumyan was the prevailing party and awarded him approximately $263,000 in attorney fees and $24,000 in costs. It entered judgment accordingly, and the lessors appeal.

---

7 The lessors have raised no issue on appeal regarding the language of the special verdict forms.

DISCUSSION

I

Sufficiency of the Evidence: Breach

A

The lessors contend they did not breach the lease agreement or the implied covenant of good faith and fair dealing. In essence, they argue that the undisputed evidence does not support the jury's verdict if the lease agreement and the scope of the implied covenant are properly construed. We agree that the evidence did not support the jury's verdict on Ambartsumyan's express breach of contract claim, but it did support the jury's verdict for breach of the implied covenant of good faith and fair dealing.

We review the jury's determinations that the lessors breached the lease agreement and the implied covenant for substantial evidence. (*Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1268; *Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1307-1308.) "When we consider whether the evidence was sufficient to support the jury's verdict, we review the entire record in the light most favorable to the judgment to determine whether there are sufficient facts, contradicted or uncontradicted, to support the judgment. [Citation.] Substantial evidence is evidence that is reasonable and credible. In evaluating the evidence, we accept reasonable inferences in support of the judgment and do not consider whether contrary inferences may be made from the evidence." (*Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 462-463.) "As in all appeals, the appellant has the burden to show, through analysis and citation to the record, that no substantial

evidence supports the [jury verdict]." (*Shenouda v. Veterinary Medical Bd.* (2018) 27 Cal.App.5th 500, 514.)

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) We are concerned in this part with the element of breach. "The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is a breach." (1 Witkin, Summary of Cal. Law (11th ed. 2018) Contracts, § 872.)

B

On Ambartsumyan's breach of contract claim, the lessors argue their conduct complied with the lease agreement's provisions governing alterations and modifications of the truck stop, which in many cases can only be made with the lessors' consent. They argue the operative facts regarding their conduct are undisputed, i.e., they concede they did not consent to Ambartsumyan's conversion of the diesel UST to gasoline. They claim, therefore, that the only issue on appeal is legal, i.e., whether the terms of the lease agreement prohibited the lessors' conduct.

Ambartsumyan responds, correctly, that his breach of contract action was not based on the lessors' failure to consent to the gasoline UST conversion. Instead, it was based on the lessors' refusal to sign the form Owner/Operator Agreement, which had the effect of blocking temporary closure of the UST as well as any potential conversion. Ambartsumyan's position is that the alteration or modification provision does not apply, so the question of the lessors' consent under that provision is irrelevant. Ambartsumyan

did not seek the lessors' consent, so they had no opportunity to withhold it (wrongfully or otherwise).

The lessors counter that they were not under any obligation to sign the Owner/Operator Agreement. The lessors are correct. No provision in the lease agreement speaks to their obligation to sign an Owner/Operator Agreement. Without a contractual provision obligating the lessors to perform, they cannot be held liable for breach of contract.

Ambartsumyan does not clearly articulate what provision of the lease he contends the lessors breached. The letter Ambartsumyan's attorney sent to the lessors putting them on notice of the alleged breach did not reference a violation of any specific section of the lease agreement. In his briefing on appeal, Ambartsumyan references the "Agreed Use" provisions of the lease agreement. The "Agreed Use" provisions obligate *Ambartsumyan* to use and occupy the truck stop only for certain Agreed Uses, which the lease agreement defined as "[r]etail sales of motor fuel, operation of a convenience store, food sales, truck weighing, truck washing, and any other lawful use related thereto." The only obligation placed on the *lessors* was to "not unreasonably withhold or delay its consent to any written request for a modification of the Agreed Use," but Ambartsumyan made no such written request. Indeed, Ambartsumyan's position was that converting the diesel UST to gasoline did not involve a change in the Agreed Uses (because Ambartsumyan continued to use the truck stop to sell motor fuel), so no such request or consent was necessary. Nothing about these provisions obligated the lessors to sign the Owner/Operator Agreement.

The evidence supporting Ambartsumyan's breach of contract cause of action must include conduct that violates a contractual provision. Because no contractual provision in the lease agreement obligated the lessors to sign the Owner/Operator Agreement, the evidence does not support the jury's verdict on that claim. And, because it is clear the historical facts do not support a claim for breach of contract, we will direct the trial court on remand to enter judgment on this claim in favor of the lessors. (See *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357 (*Singh*) ["An appellate court may reverse a judgment with directions to enter a different judgment if it appears from the record that no new evidence of significance would be presented in a new trial and there is only one proper judgment."].)

C

The absence of an express contractual provision, however, does not necessarily leave Ambartsumyan without a remedy. The jury also found that the lessors had breached the implied covenant of good faith and fair dealing. " ' "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." ' " (*Carma Developers (Cal.), Inc. v. Marathon Development Cal. Inc.* (1992) 2 Cal.4th 342, 371.) "It has been consistently applied in this state to commercial leases." (*Id.* at p. 372.)

" 'The implied promise [of good faith and fair dealing] requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement.' [Citation.] 'In essence, the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct

which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' " (*Avidity Partners, LLC v. State of Cal.* (2013) 221 Cal.App.4th 1180, 1204.) " 'Or, to put it another way, the "implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose." ' " (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 589.)

"However, the implied covenant will only be recognized to further the contract's purpose; it will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1120.) "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. [Citation.] The covenant thus cannot ' "be endowed with an existence independent of its contractual underpinnings." ' [Citation.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National Inc*. (2000) 24 Cal.4th 317, 349-350.)

Here, the implied covenant obligated the lessors to refrain from taking action that prevented Ambartsumyan from enjoying the benefits of the lease agreement, i.e., lawfully operating the truck stop. After the lessors wrote the fire department asserting control over the USTs, the fire department required Ambartsumyan and the lessors to submit an Owner/Operator Agreement in order for the truck stop to continue in lawful operation. The jury here could reasonably find that the lessors prevented Ambartsumyan from

complying with this requirement, thereby imperiling operation of the truck stop and blocking Ambartsumyan from moving forward with temporary closure of the diesel UST. The evidence therefore supports the jury's verdict that the lessors breached the implied covenant of good faith and fair dealing.

Resisting this conclusion, the lessors focus again on the lease provisions giving them discretion to approve certain alterations and modifications to the truck stop. But, again, their refusal to sign the Owner/Operator Agreement is a separate issue from the UST conversion. The lease agreement did not give the lessors discretion not to sign a document required by the fire department for the truck stop's continued lawful operation. The authorities cited by the lessors, which discuss limits on the implied covenant where a contract expressly permits the conduct at issue, are therefore inapposite. (See, e.g., *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1061.)

As to the Owner/Operator Agreement specifically, the lessors argue they "were under no obligation to sign the Owner/Operator Agreement in its then current form because it improperly [obligated] them to maintain, manage, and control the USTs." But the lessors do not provide any authority for the proposition that, as nonoperating owners, they were not obligated under California law to maintain the USTs, especially after writing to the fire department and taking control of them. The evidence presented at trial established that both owners and operators were responsible for maintenance of a UST, regardless whether the owner is actively operating the UST as well. In any event, the fire department required the Owner/Operator Agreement, and the jury could reasonably find

that the lessors prevented Ambartsumyan from complying with the fire department's requirement.

The lessors also argue that their failure to sign the Owner/Operator Agreement did not cause Ambartsumyan any damages because the lessors would never have consented to the UST conversion and the truck stop was never in fact prevented from operating. We address the lessors' arguments regarding damages in the next part. We are concerned here only with breach. The lessors have not carried their burden of showing that the evidence did not support the jury's verdict on the issue of breach of the implied covenant of good faith and fair dealing.

II

Sufficiency of the Evidence: Damages

The lessors contend that the jury's $96,000 damages award was not supported by the evidence. They criticize Ambartsumyan's testimony regarding his damages as speculative. We again review the jury's determination for substantial evidence. (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 969.)

Ambartsumyan testified that he lost profits as a result of the lessors' breaches, which ultimately prevented him from converting the gasoline UST to diesel use. "Lost profits may be recoverable as damages for breach of a contract. '[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.' [Citation.] Such damages must 'be proven to be certain both as to their occurrence and their extent, albeit not with "mathematical precision." ' [Citation.] The rule that lost profits must be reasonably

certain is a specific application of a more general statutory rule. 'No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.' " (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 773-774 (*Sargon*).)

We may assume, for purposes of this appeal, that Ambartsumyan adequately proved that he was in fact damaged by the lessor's breach of the implied covenant of good faith and fair dealing. " 'Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.' " (*Sargon*, *supra*, 55 Cal.4th at p. 774.) "If lost profits can be estimated with reasonable certainty, a court may not deny recovery merely because one cannot determine precisely what they would have been." (*Id*. at p. 779.)

In his testimony, Ambartsumyan articulated two damages theories. The first theory involved his inability to fill the third, unconverted UST with diesel fuel when wholesale prices were low. Potentially, if Ambartsumyan had been able to fill the third UST, he would have enjoyed greater profit margins when he eventually sold diesel fuel at the same retail price. But Ambartsumyan never quantified his potential damages based on that theory or provided evidence that would support such a quantification (e.g., how much more fuel he could have purchased at lower wholesale prices and how much his profit margins would have increased had he been able to do so). This theory does not support the jury's damages award.

Ambartsumyan's second damages theory involved his ability to serve more truck customers with a newly-converted diesel dispenser in the lane currently devoted to gasoline. He testified that some truck drivers might bypass his truck stop when it was busy ("two deep at every single lane"). He said that an additional diesel dispenser might alleviate that congestion and prompt more trucks to stop and buy diesel. Ambartsumyan believed he would sell approximately 1,000 gallons more per day, or fewer than 10 additional truck customers, resulting in profits of approximately $6,000 per month.

Although Ambartsumyan provided an estimate of his lost profits ($6,000 per month), there is no basis in the record for such an estimation. It is unclear why Ambartsumyan believed he was losing approximately 10 truck customers per day, rather than five or 20 (or 1,000 gallons per day, rather than 500 or 2,000). There was no evidence regarding how often the truck stop was congested, how many trucks passed by the truck stop during that time, and how many trucks decided not to stop because of any congestion. Without some basis for his estimate, Ambartsumyan's testimony was wholly speculative, and the jury's award based on that estimate was not supported by substantial evidence.

Ambartsumyan points out that a single witness's testimony may constitute substantial evidence of a fact. (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.) As a general matter, he is correct. However, to support a lost profits damages award, the evidence must "make[] reasonably certain their occurrence and extent," including "some reasonable basis of computation." (*Sargon*, *supra*, 55 Cal.4th at pp. 773-774.) "Requiring the plaintiff to prove future economic losses are reasonably certain 'ensures

that the jury's fixing of damages is not wholly, and thus impermissibly, speculative.' " (*Atkins v. City of L.A.* (2017) 8 Cal.App.5th 696, 738.) A plaintiff cannot simply pick a number and assert he was damaged in that amount. He must provide evidence of a nonspeculative basis for the requested number. Ambartsumyan did not do so. Ambartsumyan also points out that the lessors did not object to his testimony at trial. But *admitted* evidence is not the same as *substantial* evidence. (*Id*. at p. 740.) We must still consider whether the admitted evidence was sufficient to support the jury's damages award.

Ambartsumyan references the following facts as support for his damages estimate: (1) his experience operating the truck stop for 13 years, (2) the amount of diesel fuel sold by the truck stop over that time, and (3) his typical profit margins. These facts, however, do not provide a reasonable basis for Ambartsumyan to calculate damages under his damages theory. For example, Ambartsumyan's experience operating the truck stop does not translate into reliable data regarding the number of trucks passing by his truck stop on the busy freeway and other roads sufficient to support the jury verdict. More importantly, it does not give him any information about how many trucks *would* have stopped at his truck stop but decided not to do so because it was too busy. Ambartsumyan asserted that the number would yield 1,000 gallons of additional diesel fuel sales per day, or less than 10 trucks. But, based on the evidence, there is no basis for such an assertion. The lack of evidence was equally consistent with five trucks or 20 trucks, 500 gallons or

2,000 gallons. Ambartsumyan's estimate of 1,000 gallons was speculation. The jury's award based on such evidence was not supported by substantial evidence.[8]

Ambartsumyan relies on *A&M Produce Co. v. FMC Corporation* (1982) 135 Cal.App.3d 473 (*A&M*), but that opinion illustrates the shortcomings in the evidence here. In *A&M*, a farmer purchased equipment for sorting and processing tomatoes. (*Id*. at p. 478.) The equipment did not perform as promised, and the farmer was unable to bring his crop to market. (*Id*. at pp. 479-480.) The farmer sued for breach of express and implied warranties, and the jury awarded him approximately $280,000. (*Id*. at p. 481.) On appeal, among other arguments, the equipment supplier argued that the evidence did not support the award of damages. (*Id*. at p. 493.) The reviewing court disagreed. The farmer had presented evidence of the size of the crop, its condition, and the market price of the tomatoes. (*Id*. at p. 494.) This evidence provided a reasonable, nonspeculative basis on which the jury could base its damages award. (*Ibid*.)

Here, by contrast, there was no evidence—beyond Ambartsumyan's speculative estimate—regarding how many gallons of diesel fuel Ambartsumyan would have sold if he had been able to convert the gasoline UST to diesel use. The size of the tomato crop in *A&M* was proved at trial. Ambartsumyan's estimate of lost sales, by contrast, had no evidentiary basis whatsoever. It was based on Ambartsumyan's speculation regarding the

---

8 Ambartsumyan also references the lessors' letter to the fire department taking control of the USTs, but that letter also provides no support for his 1,000-gallon estimate.

behavior of truck drivers passing his truck stop. It was insufficient to support the jury's damages award.

We therefore turn to the appropriate remedy. As noted, "[a]n appellate court may reverse a judgment with directions to enter a different judgment if it appears from the record that no new evidence of significance would be presented in a new trial and there is only one proper judgment." (*Singh*, *supra*, 186 Cal.App.4th at p. 357.) "However, 'Unless this court can satisfy itself from the record as to the ultimate rights of the parties, it will not undertake in reversing a judgment to finally settle the same.' " (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 76 (*Paterno*), quoting *Pollitz v. Wickersham* (1907) 150 Cal. 238; see 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 874, 877.)

The lessors have not shown there is only one proper judgment in this dispute. Their briefing on appeal does not mention the applicable standard, and it does not discuss the likelihood that any new evidence of significance would be introduced at a new trial on damages. Moreover, although the existing record is insufficient to support the jury's damages award, we cannot say that it forecloses damages altogether. It therefore appears that Ambartsumyan could offer additional evidence of significance at a new trial, and judgment against him at this time is unwarranted. (See *Paterno*, *supra*, 74 Cal.App.4th at p. 76 ["[I]t is possible there are facts which would support a judgment in favor of [plaintiff]; accordingly, it would not be appropriate to end the lawsuit at this time."].)

On remand, the trial court should conduct a partial new trial on the issue of Ambartsumyan's damages for breach of the implied covenant of good faith and fair

dealing. We express no opinion regarding the sufficiency of the evidence that may be presented at such a partial new trial.

III

The Lessors' Cross-Claims

The lessors contend they should have prevailed on their cross-claim for breach of contract "[a]s a matter of law and based on the undisputed evidence." They claim that Ambartsumyan breached the lease agreement by failing to reimburse the lessors for the costs they incurred in upgrading the vapor recovery system to the truck stop's gasoline dispenser to comply with AQMD regulations. The jury found that Ambartsumyan was not responsible for such reimbursement.

The lessors do not cite any legal authority in support of their contention. Under these circumstances, they have waived appellate review of the jury's determination. " 'Appellate briefs must provide argument and legal authority for the positions taken. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." ' [Citation.] 'We are not bound to develop appellants' argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.' " (*Cahill v. San Diego Gas & Electric Co*. (2011) 194 Cal.App.4th 939, 956.)

Even considering the lessors' contention on its merits, the lessors have not shown error. The jury found that the lessors had not carried their burden of proof of showing that Ambartsumyan breached the lease. " '[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence

compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." ' " (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 395.)

While it was undisputed the lessors paid for the upgrade, it was not undisputed that Ambartsumyan breached the lease agreement by refusing to reimburse them. The agreement required Ambartsumyan to comply with all applicable laws and regulations at his own expense. But the upgrade was not the only way to comply with applicable laws and regulations. Ambartsumyan could have complied with the law by converting the gasoline UST to diesel fuel. He was willing to pay for that conversion. It was the lessors who wanted the upgrade and who chose the upgrade from among the options to comply with applicable laws and regulations. The upgrade was not itself compelled by those laws and regulations to maintain operation of the truck stop; the lessors themselves chose that option. The lessors therefore have not shown that Ambartsumyan was required to pay for the upgrade as a matter of law.

IV

Prevailing Party

The lessors further contend the trial court erred by determining that Ambartsumyan was the prevailing party under Civil Code section 1717. We are reversing the judgment based on our disposition of the lessors' other contentions. This necessarily reverses the court's prevailing party determination and its award of costs and

attorney fees. (See *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1027.) Following further proceedings on the merits of Ambartsumyan's claims, the trial court should reconsider the issue of the prevailing party in this action and the amount to be awarded. We express no opinion on the substance of these issues.

DISPOSITION

The judgment is reversed. On remand, the trial court is directed to conduct a partial new trial limited to Ambartsumyan's damages for breach of the implied covenant of good faith and fair dealing. Following trial, the trial court shall enter a new judgment based on (1) the outcome of the partial new trial, (2) this court's determination that the lessors are entitled to judgment on Ambartsumyan's claim for breach of contract, (3) the trial court's reconsideration of the prevailing party issue and amount to be awarded, and (4) the remaining portions of the appealed judgment that are unaffected by this opinion,

including the jury's verdict in favor of Ambartsumyan on the lessors' cross-claims. The parties shall bear their own costs on appeal.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.