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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID CHURCHILL,

Plaintiff - Appellant,

v.

WINTER CHEVROLET COMPANY
INC.; et al.,

Defendants - Appellees.

No. 06-15685

D.C. No. CV-04-00489-JCS

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Joseph C. Spero, Magistrate Judge, Presiding

Argued and Submitted February 14, 2008
San Francisco, California

Before: D.W. NELSON, KLEINFELD, and HAWKINS, Circuit Judges.

On appeal, David Churchill challenges a jury instruction. We agree with Churchill that under Cal. Civ. Pro. § 1440 and Romano v. Rockwell Int'l, Inc., 926 P.2d 1114, 1119 (Cal. 1996), repudiation by Winter Chevrolet gave Churchill an

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

election to sue for damages for the breach without continuing his performance, or else to continue his performance and sue for damages resulting from the threatened breach if and when it happened. Churchill conceded in his brief that the jury was correctly instructed on this point.

Although Churchill was entitled to make an election of remedies, the election had consequences upon which the judge instructed pursuant to Lucian v. All States Trucking Co., 171 Cal. Rptr. 262 (Cal. Ct. App. 1981). That case holds that “an employee who voluntarily leaves his employment before the calculation date is not entitled to receive it.” Id. at 264; see also Schachter v. Citigroup, Inc., 2008 WL 162244 (Cal. Ct. App. 2008); Hill v. Aetna, 181 Cal. Rptr. 564 (Cal. Ct. App. 1982); Chinn v. China Nat’l Aviation Corp., 291 P.2d 91 (Cal. Dist. Ct. App. 1955). The Chinn exception to the Lucian rule does not apply here, because the employee in Chinn was fired before the calculation date of a bonus that had induced him to stay on after he had expressed his intention to quit.

Taken in context with the remainder of the jury instructions, the challenged instruction does not misstate California law and would not mislead the jury to Churchill’s prejudice. Cascade Health Solutions v. Peacehealth, 502 F.3d 895,

909, 930 (9th Cir. 2007). Further, the trial judge did not abuse his discretion in selecting the particular formulation of the instruction. See id.

AFFIRMED.