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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ROBERT ZIINO,

Plaintiff and Respondent,

v.

LAURA WELLMAN,

Defendant and Appellant.

A131473

(Humboldt County  
Super. Ct. No. DR 09 0139)

Plaintiff and respondent Robert Ziino and defendant and appellant Laura Wellman lived together for a number of years and had a child together. Late in their relationship Wellman executed two promissory notes in favor of Ziino in part to provide support for their child. When Wellman filed for bankruptcy protection, Ziino filed a creditor's claim, established his right to recover on the notes in a contested adversary proceeding and was paid some of the monies to which he was entitled. Wellman stipulated the notes were nondischargeable, and she therefore remained liable for the unpaid amounts. Ziino filed the instant action to recover the balance due on the notes. The trial court granted summary judgment for Ziino. We affirm.

**I. BACKGROUND**

Wellman and Ziino never married but lived together from 1994 through 2002. They had a child in 1999. In 2001, Wellman signed two due-on-demand promissory notes, one for \$300,000 and one for \$500,000. Each note obligated her to pay Ziino the money without interest on a future due date of his choosing, after which interest would

accrue at a rate of 10 percent. The notes would also become due if Wellman filed for bankruptcy protection.

On October 25, 2002, Wellman filed for Chapter 7 bankruptcy protection.

Four months later, in February 2003, Ziino filed an adversary proceeding in the bankruptcy case seeking to have the debt due under the notes deemed “non-dischargeable.” In June, Wellman stipulated to denial of discharge. The same month, Ziino filed a proof of claim for the \$800,000 due under the notes. He asserted the notes were compensation for child support he would provide and implemented a negotiated division of property as Ziino and Wellman disentangled their lives.

In August 2005, Wellman objected to Ziino’s creditor’s claim. She asserted Ziino provided no consideration for the notes, she signed the notes under duress, and she signed the notes while lacking mental capacity to contract.

In March 2007, Ziino moved for summary judgment on his creditor’s claim. The following month, the bankruptcy court granted Ziino’s motion. The court determined there was consideration for the notes and rejected Wellman’s other defenses because she failed to produce evidence to support them. In April, the bankruptcy court issued its “Order Overruling Objection to Claim No. 1,” rejecting Wellman’s objections and allowing Ziino’s claim “in the amount of \$800,000.” Wellman appealed, and the Bankruptcy Appellate Panel of the Ninth Circuit affirmed on November 9, 2007.

In the meantime, on May 29, 2007, shortly after the bankruptcy court granted summary judgment, Ziino had filed an action in the United States District Court in Florida in an attempt to enforce his \$800,000 claim against the estate and trust of Wellman’s father, who died in 2006. In August 2009, the district court ruled against Ziino on cross-motions for summary judgment. The court concluded the bankruptcy order allowing his creditor’s claim was not a final, enforceable judgment. It also concluded Ziino had sued the wrong parties—i.e., the estate of Wellman’s father was not liable for Wellman’s personal debts, and Wellman was not a beneficiary of her father’s

trust. The district court noted, however, Ziino was “entitled to pursue [Wellman] and attempt to collect the balance of the nondischarged debt . . . in any manner provided by law.” Ziino appealed to the Eleventh Circuit.

In the meantime, on February 23, 2009, Ziino had filed this lawsuit in California directly against Wellman. The first three versions of Ziino’s complaint alleged breach of contract for Wellman’s failure to pay off the notes. Wellman repeatedly demurred to these complaints, asserting the statute of limitations on Ziino’s contract action had run. Ziino voluntarily amended his original and first amended complaint. The sufficiency of his second amended complaint was decided by the trial court, which sustained Wellman’s demurrer with leave to amend.

Ziino then filed a third amended complaint, the operative complaint in this action. It alleged the statute of limitations on his contract claim had not expired because it had been equitably tolled while Ziino pursued relief on the notes in Wellman’s bankruptcy case. Ziino alleged his bankruptcy claim was timely filed and gave Wellman notice of the dispute. He further alleged proceeding in the bankruptcy court was a reasonable alternative to a contemporaneous state court suit. Finally, he alleged Wellman availed herself of the bankruptcy court’s adversarial procedures, including discovery and motion practice, and could not claim any prejudice from Ziino now pursuing relief on the notes in this action. The third amended complaint also included a new cause of action, for enforcement of the bankruptcy court order under Code of Civil Procedure section 337.5,<sup>1</sup> and asserted the limitations period for this cause of action was 10 years. The trial court overruled another demurrer by Wellman, and she filed an answer generally denying Ziino’s allegations and asserting the statute of limitations as one of several affirmative defenses.

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

On January 12, 2010, Ziino moved for summary judgment. The motion recapped the history of the parties' dispute, including Wellman's filing for bankruptcy protection, Ziino's institution of an adversary proceeding to have the debts declared nondischargeable, Wellman's eventual stipulation to such, the proof of claim adversary proceeding, Wellman's asserted defenses to liability on the notes, and the bankruptcy court's rejection of her defenses, determination the notes were valid and enforceable, and approval of the entire amount owed under the notes as a creditor's claim. The motion did not, however, separately discuss the breach of contract and enforcement causes of action, and while it discussed the 10-year limitations period applicable to the enforcement cause of action, it did not discuss the period applicable to the breach of contract claim. However, the motion did ask the trial court to find that the bankruptcy court order allowing Ziino's creditor's claim was res judicata as to the validity and enforceability of the "promissory notes," a request relevant specifically to the breach of contract cause of action. The motion also sought prejudgment interest from October 25, 2002, the date Wellman filed for bankruptcy, causing the notes to come due immediately and from which point she was in breach of her payment obligations.

Wellman filed her own motion for summary judgment on April 13, 2010, and filed opposition to Ziino's motion on April 20, 2010. In her motion and in her opposition she incorrectly asserted the "sole cause of action" in Ziino's operative complaint was for enforcement of a judgment under section 337.5 and argued the bankruptcy order allowing Ziino's creditor's claim was not an enforceable money judgment, as the Florida district court had ruled. Her opposition, however, also contained a section addressing Ziino's breach of contract claim, in which she contended "there are triable issues of fact" that Ziino procured "[t]he underlying promissory note . . . through fraud" and "fraud renders a contract void." Wellman requested that the court take judicial notice of the Florida district court decision. Ziino did not oppose the request, and the trial court granted it.

Ziino filed a reply in support of his summary judgment motion on May 4, 2010, and opposition to Wellman's summary judgment motion on June 25, 2010. Again, his papers recapped the parties' dispute, including the history of the promissory notes and the bankruptcy proceedings, but did not separately or explicitly address the breach of contract and enforcement causes of action.

On July 9, 2010, Wellman filed a reply memorandum in support of her motion for summary judgment. Like her moving papers, it, too, did not acknowledge or address the breach of contract cause of action.

On July 30, 2010, while the summary judgment motions were pending before the trial court, the Eleventh Circuit heard oral argument in Ziino's appeal from the Florida district court judgment. On August 9, Wellman informed the trial court the argument had focused on whether the bankruptcy court's order allowing Ziino's creditor's claim was an enforceable money judgment. On that basis, she requested a stay of the summary judgment proceedings until the Eleventh Circuit issued its opinion.

The trial court denied Wellman's stay request, and on August 27, 2010, it issued written orders on the pending cross-motions for summary judgment. The court granted Ziino's motion and denied Wellman's, stating it could "think of no clearer set of facts for which the doctrine of res judicata would apply" and concluded the bankruptcy court order allowing Ziino's creditor's claim entitled him to a judgment in the present action. The trial court did not mention the Florida district court's judgment. Nor did it differentiate between Ziino's two causes of action. It, like the parties, treated the two claims in one jumble, and its only comment about timeliness was that it "agree[d] with that . . . authority cited by [Ziino] as to the issue of timeliness of this State action." Ziino's authority, at least in his moving papers, related to the 10-year period for enforcement actions.<sup>2</sup>

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<sup>2</sup> No reporter's transcript of the summary judgment hearing has been provided.

In the meantime, on August 11, 2010—just before the trial court ruled on the Ziino’s and Wellman’s summary judgment motions—the Eleventh Circuit issued its opinion affirming the Florida district court’s judgment against Ziino. The Eleventh Circuit concluded: “Ziino’s allowed claim in the prior bankruptcy proceeding is not a judgment on which he can execute against assets of the debtor. Ziino’s proper recourse is to file a direct action against Wellman for her breach of the promissory note obligations. Until an executable money judgment against Wellman exists, it is improper to attempt to levy against assets held by or for her. For these reasons, we affirm the district court’s grant of summary judgment in favor of the trustees and estate representatives.” (*Ziino v. Baker* (11th Cir. 2010) 613 F.3d 1326, 1329.)

Based on the Eleventh Circuit’s opinion, Wellman, on September 7, 2010, moved for reconsideration of the summary judgment rulings. She continued to assert that, because the bankruptcy court order granting Ziino’s creditor’s claim was not a money judgment, Ziino had no basis to pursue an enforcement action in California.

On November 30, 2010, the trial court issued a written order denying Wellman’s reconsideration motion. It did not view the Eleventh Circuit’s decision, which also recounted the factual and procedural background of the dispute over the enforceability of the notes, as barring Ziino “from seeking a money judgment in this court.” The court also stated it had granted Ziino summary judgment “because the defenses raised by defendant Laura Wellman in the state proceedings have been fully litigated in the bankruptcy proceedings and because it [*sic*] as a matter of law it is improper to allow the parties to re-litigate those issues.” On January 18, 2011, the trial court issued a written order granting summary judgment for Ziino and entering judgment against Wellman for the \$800,000 due on the notes, \$655,983.31 in prejudgment interest since October 25, 2002, at 10 percent, and \$550 in costs—less a \$159,658 credit for payments previously made through the bankruptcy proceedings.

On March 16, 2011, Wellman filed a notice of appeal from the January 18, 2011, order and judgment.

## II. DISCUSSION

Summary judgment or summary adjudication is proper only if there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (§ 437c, subds. (c), (f).) On appeal, we review the grant of summary judgment or summary adjudication under the same standard. (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 631, fn. 1.) “ ‘[W]e review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.’ (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 . . . .) When there is no dispute as to the relevant facts, we exercise our independent judgment as to their legal effect. (*Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321, 325 . . . .)” (*Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 739-740.)

It is critical to distinguish between Ziino’s two causes of action, and it is unfortunate the parties failed to do so and thus produced a record that is as obtuse and jumbled as their moving and opposing papers. We nevertheless have combed through the record on appeal, and based thereon, and under various maxims of appellate review, are able to ascertain the propriety of the judgment. We first discuss Ziino’s second cause of action for enforcement under section 337.5. We secondly discuss his first cause of action for breach of contract.

### ***Enforcement Claim***

In his second cause of action, Ziino sought enforcement of the bankruptcy court’s April 11, 2007, “Order Overruling Objection to Claim No. 1,” which allowed his creditor’s claim against Wellman in the amount of \$800,000. As the Eleventh Circuit has held, however, this order is “not a judgment on which [Ziino] can execute against assets of the debtor.” (*Ziino v. Baker, supra*, 613 F.3d at p. 1329.) Thus, as Wellman

maintains, the Eleventh Circuit’s ruling (which is consistent with other federal authority [see *In re Mobile Steel Co.* (5th Cir. 1977) 563 F.2d 692, 700; *In re Kansas City Journal-Post Co.* (8th Cir. 1944) 144 F.2d 791, 803-804]), establishes Ziino did not procure a “judgment” from the bankruptcy court that he can enforce through an action under sections 335 and 337.5.<sup>3</sup> We therefore turn to Ziino’s first cause of action for breach of contract.

### ***Breach of Contract Claim***

Even though the bankruptcy court’s April 11, 2007, “Order Overruling Objection to Claim No. 1” is not an enforceable “money judgment,” it is still a final judgment on the merits for preclusion purposes, and as such, establishes Ziino’s entitlement to a judgment against Wellman for breach of contract.<sup>4</sup>

“The doctrine of res judicata precludes parties or their privies from relitigating an issue that has been finally determined by a court of competent jurisdiction. [Citation.] “Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.” [Citation.]’ (*Levy v. Cohen* (1977) 19 Cal.3d 165, 171 . . . .)” (*Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1162.) Res judicata applies when (1) an issue raised in the present action is identical to one litigated in a prior proceeding; (2) “the prior proceeding resulted in a final judgment on the merits;” and (3) “the party against whom

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<sup>3</sup> Section 335 states: “The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: . . .” Section 337.5 follows, stating “Within 10 years: [¶] . . . [¶] (b) An action upon a judgment or decree of any court of the United States or of any state within the United States.”

<sup>4</sup> As we have set forth, the federal action established only that the bankruptcy court’s order allowing Ziino’s creditor’s claim was not, itself, an executable money judgment. It did not establish that Ziino is prohibited from using the bankruptcy court’s order to obtain such a judgment. On the contrary, the Eleventh Circuit expressly stated Ziino could “file a direct action against Wellman for her breach of the promissory note obligations.” (*Ziino v. Baker, supra*, 613 F.3d at p. 1329.)

the doctrine is being asserted was a party or in privity with a party to the prior proceeding.” (*Pitzen v. Superior Court* (2004) 120 Cal.App.4th 1374, 1381.)

Each of the elements of res judicata is present here: The contested adversary proceeding in the bankruptcy case concerning Ziino’s creditor’s claim, and Ziino’s first cause of action in this action for breach of contract, both concern the validity of the notes at issue and Wellman’s alleged breach of them. Wellman was a party in the bankruptcy case and vigorously disputed Ziino’s claim that the notes are valid and he is entitled to recover on them.<sup>5</sup> (She continued to dispute Ziino’s right to recover on the notes on appeal to the Bankruptcy Appellate Panel of the Ninth Circuit.) And the contested adversarial proceeding resulted in a final judgment on the merits in favor of Ziino for purposes of res judicata; indeed, he recovered on the notes in the bankruptcy case, although to only a limited degree as one of several creditor’s of the bankruptcy estate. (See *Nathanson v. Hecker, supra*, 99 Cal.App.4th at p. 1163 [“ ‘a bankruptcy court’s allowance or disallowance of a claim is a final judgment’”]; see also *In re Thrall* (Bankr. D. Colo. 1996) 196 B.R. 959, 972-973 [“creditor can utilize the principles of collateral estoppel or *res judicata* to obtain a money judgment from a court of broader jurisdiction after the bankruptcy”].) Accordingly, the bankruptcy court’s order approving Ziino’s creditor’s claims and rejecting Wellman’s defenses thereto conclusively establishes that Ziino’s breach of contract cause of action is meritorious.

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<sup>5</sup> The defenses Wellman raised against Ziino’s creditor’s claim in the bankruptcy case—lack of consideration, lack of mental capacity, and duress—are akin to the affirmative defenses in her answer to Ziino’s third amended complaint in this case, i.e., lack of consideration, fraudulent inducement, and mutual mistake (in addition to the statute of limitations). In any case, Wellman had every opportunity to raise any and all defenses to Ziino’s claim on the notes. (See *In re Prather* (2010) 50 Cal.4th 238, 260 (conc. opn. of Moreno, J.) [res judicata bars relitigation not only of issues that were actually litigated, but issues that could have been litigated]; *Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 821-822 [barring affirmative defenses that could have been litigated].)

The remaining issue is whether Ziino's otherwise meritorious breach of contract cause of action is barred by the applicable statute of limitations. An action for breach of written contract must be brought within four years. (§ 337; *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1148.)

In the trial court, Wellman argued Ziino could have brought his contract cause of action as early as June 2003, after the bankruptcy court ordered her obligations on the notes nondischargeable (although this was nearly four years before the parties litigated the merits of Ziino's right to recover on the notes and the bankruptcy court in April 2007 rejected Wellman's defenses and approved Ziino's creditor's claim). She therefore asserted the four-year limitations period ran in June 2007, almost two years before Ziino filed this action on February 23, 2009.

However, in his third amended complaint, Ziino included specific allegations that the limitations period was tolled while he sought relief for Wellman's breach of the notes through the bankruptcy court's claim process. Whether that process ended on April 11, 2007, when the bankruptcy court issued its order overruling Wellman's objections and allowing Ziino's claim "in the amount of \$800,000," or on November 9, 2007, when the Bankruptcy Appellate Panel of the Ninth Circuit affirmed the allowance of Ziino's creditor's claim, Ziino's breach of contract action would be well within the four-year limitations period.

"The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. [Citations.] It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' [Citation.] Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' [Citation.]" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 (*McDonald*)). "Though the doctrine operates independently of the language of the Code of Civil Procedure and other codified

sources of statutes of limitations [citations], its legitimacy is unquestioned.” (*Id.* at p. 100.)

The paradigmatic application of the doctrine is “ ‘ “[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.” ’ [Citations.] Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason.” (*McDonald, supra*, 45 Cal.4th. at p. 100.) For example, it can apply to save a late-filed federal suit when a timely suit on the same claim was erroneously filed in state court but had to be dismissed. (*Burnett v. New York C. R. Co.* (1965) 380 U.S. 424, 426.) Likewise, it can save a late-filed state suit first filed timely in federal court. (*Addison v. State* (1978) 21 Cal.3d 313, 318-319 [equitable tolling appropriate when both suits involved the same cause of action, first federal suit gave defendants notice, and state suit brought without undue delay].)

Equitable tolling requires a showing of three elements: timely notice to the defendant, lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff. (*McDonald, supra*, 45 Cal.4th at p. 102 & fn. 2.) All three elements are present here. Wellman received timely notice of the dispute when Ziino filed his claim on the promissory notes in the bankruptcy court in 2003, well within any potentially applicable limitations period. Wellman has suffered no prejudice because the bankruptcy claim and contract cause of action concern one and the same dispute. (*Ibid.* [“ ‘ “The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant’s investigation of the first claim will put him in a position to fairly defend the second.” ’ ”].) Finally, Ziino acted pragmatically and in good faith, waiting to see what relief the bankruptcy proceeding could afford him before pursuing alternate remedies, whether against Wellman or others.

The trial court did not make an express finding as to equitable tolling, nor was it required to do so. It is also well established that we deem the trial court to have made all findings necessary to support its judgment. (See *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1148-1149; *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1142-1143.) Since it is clear the trial court was fully apprised about Ziino's prosecution of his creditor's claim in the bankruptcy case (for example, both the federal district court judgment and the Eleventh Circuit's opinion were before the court and are part of the record) and the trial court denied Wellman's motion for reconsideration on the ground the federal court proceedings did not bar Ziino from obtaining a money judgment (which could only be obtained pursuant to his first cause of action for breach of contract), the record fully supports an implied finding that the statute of limitations applicable to Ziino's breach of contract cause of action was equitably tolled while he prosecuted his creditor's claims against Wellman in the bankruptcy case.

In summary, the bankruptcy court's order granting Ziino's creditor's claims is res judicata and conclusively establishes the merits of his breach of contract claim, and the record fully supports an implied finding that the four-year statute of limitations for bringing a contract claim was an equitably tolled claim while Ziino pursued his creditor's claims in the bankruptcy case. Accordingly, summary judgment was properly granted on the basis of Ziino's first cause of action for breach of contract.

### **III. DISPOSITION**

The judgment is affirmed.

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Banke, J.

We concur:

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Marchiano, P. J.

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Dondero, J.