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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MARK CELSI,

Plaintiff and Appellant,

v.

H&R BLOCK TAX SERVICES LLC et  
al.,

Defendants and Respondents.

A132634

(Humboldt County  
Super. Ct. No. DR081255)

Plaintiff and appellant Mark Celsi claims defendants and respondents H&R Block Tax Services LLC, and H&R Block Tax and Business Services, Inc. (collectively “H&R Block”) orally promised him franchise rights to the City of Arcata. This promise, Celsi asserts, fraudulently induced him to sign a written franchise agreement for the nearby cities of Eureka and McKinleyville in violation of the California Franchise Investment Law (CFIL). (Corp. Code, § 31000 et seq.)<sup>1</sup> Celsi further asserts H&R Block breached the written franchise agreement, as amended by the alleged oral promise for Arcata, when it denied Celsi the Arcata territory and awarded it to a third party. The trial court sustained a demurer to Celsi’s statutory claim. It also granted summary judgment to H&R Block on Celsi’s remaining contract-based claims, ruling the parol evidence rule

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

precluded evidence of the alleged oral agreement. Celsi appeals from the judgment entered after these rulings; we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Celsi and H&R Block entered into a Satellite Franchise Agreement on November 1, 1999. In exchange for \$800, Celsi acquired the exclusive right to prepare income tax returns and related services under the H&R Block trademark “from a location or locations within the Franchise Territory,” defined as “the City of Eureka.” Section 23, titled “Cancellation of Prior Understanding; Amendments,” reads:

“This Agreement expresses fully any understanding by and between the parties hereto and all prior understandings, or commitments of any kind, oral or written, as to this franchise and any matter covered by this Agreement are hereby superseded and cancelled, with no further liabilities or obligations of the parties with respect thereto except as to any monies due and unpaid between the parties to this Agreement at the time of the execution of this Agreement. This Agreement may be amended only in a writing signed by both of the parties hereto.”

On the same day, Celsi and H&R Block executed an addendum to Satellite Franchise Agreement. For an additional \$400, Celsi acquired the exclusive right to prepare income tax returns and related services under the H&R Block trademark “from a location or locations within the City of McKinleyville” on the “same term and conditions as those rights granted by the Satellite Franchise Agreement.”

Celsi and H&R Block did not execute a similar addendum for Arcata.<sup>2</sup> But, according to Celsi, H&R Block’s representative, Doug Fiero, told Celsi he had the right at a later date to open an Arcata office. Based on this assurance, Celsi marketed to

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<sup>2</sup> Celsi’s father, Fred Celsi, was previously an H&R Block franchisee. Unlike his son, Fred Celsi obtained rights to Arcata through a written addendum dated November 29, 1988. Fred Celsi assigned his franchise rights to his son, prompting H&R Block to enter the November 1999 Satellite Franchise Agreement with Celsi. The assignment expressly included rights to Eureka and McKinleyville, where Fred Celsi had offices, but omitted Arcata, where he did not.

Arcata residents and cultivated them as clients, serving them from his office locations in Eureka and McKinleyville.

On September 8, 2000, Celsi wrote to H&R Block seeking to exercise his asserted right to open an office in Arcata. He said he had acquired 70 new high-end, Arcata-based clients from a certified financial planner, but some of these clients did not want to travel to Eureka or McKinleyville. To better serve them and the other 600 clients he already had from Arcata, Celsi determined the time had come to open an Arcata office. Celsi's letter included a check for \$400 to cover the new location fee.

H&R Block returned Celsi's check and told him he could not open an office in Arcata because it was outside his franchise territory. Three months later, H&R Block gave franchise rights in Arcata to a third party.

Celsi sued H&R Block on December 31, 2008. His second amended complaint alleged breach of contract, anticipatory breach of contract, and declaratory relief. H&R Block moved for summary judgment on July 15, 2010.

In the meantime, Celsi obtained leave to file a third amended complaint to add a new cause of action, violation of section 31201 of the CFIL. H&R Block demurred to this new claim on November 29, 2010.

On January 26, 2011, the trial court filed an order sustaining H&R Block's demurrer to the CFIL claim without leave to amend. On April 20, 2011, the court filed an order granting summary judgment on the remaining contract-based causes of action. The trial court entered final judgment against Celsi and in favor of H&R Block on all causes of action on June 17, 2011. H&R Block filed a notice of entry of the judgment on June 21, 2011. Celsi filed a timely notice of appeal.

## **DISCUSSION**

### ***Demurrer to Franchise Investment Law Claim***

“ ‘A demurrer tests the legal sufficiency of the complaint.’ [Citation.] On review of an order sustaining a demurrer without leave to amend, our initial standard of review is

de novo, ‘i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.’ [Citation.] In analyzing the complaint, we ‘give[] the complaint a reasonable interpretation, and treat[] the demurrer as admitting all material facts properly pleaded.’ [Citation.]” (*Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 665.) “When the trial court sustains a demurrer without leave to amend, we review that decision for abuse of discretion. [Citation.] We will reverse for abuse of discretion if we determine that there is a reasonable possibility the plaintiff can cure the pleading by amendment.” (*Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.* (2012) 203 Cal.App.4th 913, 919.)

The intent of the CFIL is “to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered,” and “to prohibit the sale of franchises where the sale would lead to fraud or a likelihood that the franchisor’s promises would not be fulfilled, and to protect the franchisor and franchisee by providing a better understanding of the relationship between the franchisor and franchisee with regard to their business relationship.” (§ 31001.)

As relevant here, the CFIL makes it “unlawful for any person to offer or sell a franchise in this state by means of any written or oral communication . . . which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” (§ 31201.) “Any person who violates Section 31201 shall be liable to any person (not knowing or having cause to believe that such statement was false or misleading) who, while relying upon such statement shall have purchased a franchise, for damages, unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know, (or if he had exercised reasonable care would not have known) of the untruth or omission.” (§ 31301.)

Celsi alleged H&R block induced him to sign the 1999 Satellite Franchise Agreement by promising to reserve the Arcata territory for him to claim, once he had enough customers in the area to justify an expanded physical presence. He also alleged, in the vaguest of terms, that H&R block repeated this assurance “in the years after” execution of the Satellite Franchise Agreement. H&R Block’s eventual refusal of Celsi’s 2008 request to open an Arcata office was, according to Celsi, in derogation of its promises to reserve the territory and “in violation of the anti-fraud provisions of the CFIL.”

While the parties addressed numerous issues concerning the CFIL in their briefs, they did not address section 31304, the statute of limitations specifically pertaining to CFIL fraud claims. On appeal from an order sustaining a demurrer, we are permitted to address “matters not expressly ruled upon by the trial court.” (*Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.*, *supra*, 203 Cal.App.4th at p. 918; cf. *Coral Construction, Inc. v. City and County of San Francisco* (2004) 116 Cal.App.4th 6, 14, 26-27 [considering statute of limitations as alternate theory for affirming summary judgment].) We therefore requested and received supplemental briefing on the applicability of section 31304.

Section 31304 states in its entirety: “No action shall be maintained to enforce any liability created under Section 31301 unless brought before the expiration of two years after the violation upon which it is based, expiration of one year after the discovery by the plaintiff of the facts constituting such violation, or 90 days after delivery to the franchisee of a written notice disclosing any violation of Section 31201 or 31202 which notice shall be approved as to form by the commissioner, *whichever shall first expire.*” (§ 31304, italics added.)

Ten years ago, in *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (2002) 95 Cal.App.4th 709 (*Speedee*), the Court of Appeal applied section 31304 according to its plain terms, including the directive that the first expiring time

period governs. The court thus concluded section 31304 imposes an “*absolute*” two-year “*outside limit*” on claims based on sections 31201 and 31301. (*SpeeDee*, at pp. 726-727.) Accordingly, if a plaintiff discovers a violation during the final year of the two-year period, the plaintiff must bring the claim before the two-year period elapses. Further, if a plaintiff does not discover a violation until after the two-year period, the plaintiff has no recourse. The outer two-year period commences to run even if the violation remains concealed and even if plaintiff has not yet suffered damages. It then runs relentlessly, without tolling, even if the franchisor is engaged in conspiracy. (*Id.* at pp. 723-724, 726-727; accord, *Dos Beaches, LLC v. Mail Boxes Etc., Inc.* (S.D. Cal. Feb. 15, 2012, No. 09CV2401-LAB) 2012 WL 506072 \*1, \*17 [“the claim must be brought by the earlier of ‘the expiration of two years after the violation upon which it is based’ or ‘one year after the discovery by the plaintiff of the facts constituting such violation’ ”]; *Tilted Kilt Franchise Operating, LLC v. Helper* (D. Ariz. Apr. 22, 2011, No. CV-10-1951-PHX-DGC) 2011 WL 1526951 \*1, \*2 [the two-year period is absolute and not subject to tolling and a “claim for violations of § 31201, therefore, must be brought within two years of the execution of the franchise agreement”]; *Samica Enterprises, LLC v. Mail Boxes Etc. USA, Inc.* (C.D. Cal. 2008) 637 F.Supp.2d 712, 724 [outer limit is absolute]; *G.C. & K.B. Investments, Inc. v. Komarczyk* (N.D. Cal. Jan. 23, 2006, No. C-05-3333-MMC) 2006 WL 194268 \*1, \*3 [“the statutes of limitations set forth in §§ 31303 and 31304 ‘impose absolute limits’ and are not subject to tolling”].)

Celsi does not dispute that the two-year outside limit on CFIL claims is absolute. Rather, he argues the “violation” he seeks to redress did not occur 13 years ago, in 1999, when H&R Block granted him the rights to Eureka and McKinleyville, but in 2008, when H&R Block denied him the Arcata territory—and the year Celsi filed this suit. The denial, claims Celsi, rendered H&R Block’s earlier assurances about Arcata false and actionable under the CFIL.

Celsi's argument is unavailing. Section 31201 makes it "unlawful for any person to *offer or sell* a franchise in this state by means of any" material misrepresentations or omissions. (§ 31201, italics added.) Thus, the conduct at which the statute is directed is that which occurs at the time of an "offer" or a "sale" of a franchise, which in this case occurred in 1999. Section 31301 similarly defines a CFIL victim as one who, "while relying upon [a false or misleading] statement shall have purchased a franchise." (§ 31301.) Thus, again, the conduct at which the statute is directed is that which occurs before or contemporaneously with a purchase, not afterwards.

Therefore, any CFIL violation Celsi suffered necessarily occurred on or before November 1, 1999, the date he acquired the Eureka and McKinleyville franchises from H&R Block under the Satellite Franchise Agreement and Addendum. No statements made after that date could have induced Celsi to make the purchase and, thus, no such statements are actionable as CFIL violations. (See *Speedee, supra*, 95 Cal.App.4th at p. 726 [all "the representations were made prior to the March 23, 1992, execution of his local franchise agreement"]; *Tilted Kilt Franchise Operating, LLC v. Helper, supra*, 2011 WL 1526951 at \*2 [a "claim for violations of § 31201, therefore, must be brought within two years of the execution of the franchise agreement"].)

In advancing his argument that H&R Block's CFIL violation occurred some nine years after execution of the franchise agreement, Celsi asserts H&R Block's promises "did not become 'untrue statements . . .' until H&R Block disavowed them" at that time. On the one hand, this assertion is at odds with a claim of fraud at the time Celsi entered into the franchise agreement—the kind of claim as to which the CFIL is directed. On the other hand, Celsi is essentially asking us to disregard the plain language of the statute and apply a variation of the delayed discovery rule *Speedee* rejected. (See *Speedee, supra*, 95 Cal.App.4th at pp. 723-725.) We agree with *Speedee* that the Legislature has been

highly specific about the running of the CFIL limitations period and that any extension of the specified time periods is a matter for the Legislature, not the courts.<sup>3</sup>

We therefore conclude the allegations of Celsi's complaint demonstrate his CFIL claim is time barred, and H&R Block's demurrer was properly sustained.<sup>4</sup>

### ***Contract Claims***

Celsi's causes of action for breach of contract, anticipatory breach of contract, and declaratory relief arise from the same central allegation—that H&R Block breached an oral agreement to reserve the Arcata territory for Celsi. The trial court applied the parol evidence rule, concluded the parties' written agreements left no room for a collateral oral agreement concerning Arcata, and granted summary judgment to H&R Block.

Summary judgment 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. (Code Civ. Proc., § 437c, subds. (c), (f).) On appeal, we review the grant of summary judgment 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

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<sup>3</sup> Even if we applied a discovery rule, the record shows Celsi was on inquiry notice of H&R Block's alleged fraud as early as 2001, seven years before filing suit. In a letter Celsi sent to H&R Block in September of that year (a copy of which he attached to his second amended complaint), he wrote “I do not understand why I cannot open a new office [in Arcata] under the terms of my current contract.” This statement indicates awareness H&R Block was behaving inconsistently with an alleged promise to save Arcata for him. (See *Doe v. Roman Catholic Bishop of Sacramento* (2010) 189 Cal.App.4th 1423, 1432-1433 [discovery rule discourages dilatory tactics by charging a plaintiff with presumptive knowledge of an injury if he or she has information of circumstances to put him or her on inquiry or has the opportunity to obtain knowledge from sources through investigation].) The record also indicates H&R actually offered Arcata to Celsi, but on terms different and less favorable to him than those applicable to Eureka and McKinleyville and terms Celsi rejected on the ground Arcata was already included in his franchise agreement (which, as we discuss in the next section, it was not).

<sup>4</sup> We need not, and do not, reach any other issues concerning Celsi's CFIL claim.

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.)

The parol evidence rule “codified in Code of Civil Procedure section 1856, provides that the terms of a writing intended by the parties as a final expression of their agreement cannot be contradicted by evidence of either a prior agreement or a contemporaneous oral agreement. (*Id.*, subd. (a); see Civ. Code, § 1625.)” (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 352.) “Further, if the parties intended the writing to be [a full integration, that is,] a complete and exclusive statement of the terms of the agreement, its terms cannot be explained or supplemented by evidence of consistent additional terms. (Code Civ. Proc., § 1856, subd. (b).)” (*Ibid.*; see also *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343 [the rule “ ‘generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument’ ”].) Even when an agreement is fully integrated, extrinsic evidence may be admissible, but only to explain or interpret ambiguous language. (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 376.)

To determine whether a written agreement is fully integrated for purposes of the parol evidence rule, courts consider the language and completeness of the written agreement, whether it contains an integration clause, the terms of the alleged oral agreement and whether they contradict those in writing, whether the oral agreement might naturally be made as a separate agreement, and the circumstances surrounding the transaction and its subject matter, nature and object. (*McLain v. Great American Insurance Companies* (1989) 208 Cal.App.3d 1476, 1484.) While some courts state “ ‘finality may be determined from the writing itself,’ ” (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP, supra*, 201 Cal.App.4th at p. 376), most

insist on consideration of the other factors mentioned, but still consider the writing “an important consideration, particularly when it recites . . . words of ‘integration.’ ”

*(Brawthen v. H&R Block, Inc. (1972) 28 Cal.App.3d 131, 137.)*

Whether the parol evidence rule applies is a “mixed question of fact and law” suitable for resolution on summary judgment when “what happened” is not in dispute. *(FPI Development, Inc. v. Nakashima (1991) 231 Cal.App.3d 367, 390-392; see also Haggard v. Kimberly Quality Care, Inc. (1995) 39 Cal.App.4th 508, 517 [“Whether the agreement is an integration is thus a question of law for the court.”]; cf. Code Civ. Proc., § 1856, subd. (d) [“The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement.”].)*

Applying the principles of integration to the Satellite Franchise Agreement, as amended by the McKinleyville addendum, we start by noting the writings undisputedly address all aspects of the franchisee-franchisor relationship. In addition, section 23 of the written franchise agreement contains “words of integration,” stating any prior oral understandings are superseded and cancelled. Further, the agreement can be amended “only in a writing signed by both of the parties hereto.” The alleged collateral oral agreement—that H&R Block promised to keep Arcata open for Celsi to claim in the future—also addresses a topic, the franchise “territory,” the written agreement and addendum expressly cover. The main agreement grants Eureka to Celsi, and the McKinleyville addendum’s sole purpose is to expand Celsi’s territory to include McKinleyville.

Given that the Satellite Franchise Agreement expressly addresses Celsi’s territory, the agreement cannot be amended except in a writing signed by both parties, and the parties executed a written addendum to expand Celsi’s territory, it was wholly unreasonable for Celsi to rely, as he claims, on an oral promise of another territory in the

future. It likewise was unreasonable for him to believe H&R Block would make such a significant commitment in a separate, off-the-cuff oral agreement, particularly since such an oral agreement would vary the explicit territorial provisions of the written agreement, as well as the integration clause. (Cf. *Singh v. Southland Stone, U.S.A., Inc.*, *supra*, 186 Cal.App.4th at p. 354 [“In light of the demonstrated importance to the parties of their respective rights with respect to the duration of employment, the trial court properly concluded that they would have included in the written agreement a provision establishing a fixed term of employment if they had in fact agreed to such a term.”].)

Although the parties have not cited, nor have we located, any California breach of contract cases involving the instant fact scenario—namely, an alleged collateral oral promise of an additional franchise territory—we have located such cases from other jurisdictions. These cases apply the parol evidence rule, and we find them persuasive. In *Cook v. Little Caesar Enterprises, Inc.* (6th Cir. 2000) 210 F.3d 653, 656 and footnote 4, a pizza restaurant franchisee claimed he was promised “an exclusive territory east of Blackstone” and “future options to open restaurants in Clovis and Sanger.” But the franchisee’s “bare allegation” of these promises was “insufficient to create a genuine issue of material fact since the plain language of the franchise agreements specifically provide[d] otherwise.” (*Id.* at p. 656 [affirming grant of summary judgment on breach contract claim].) Similarly, in *Schubot v. McDonalds Corp.* (S.D. Fla. 1990) 757 F.Supp. 1351, 1353, 1358, the plaintiffs alleged McDonalds told the franchisee he “would be considered for any future expansion in Palm Beach County.” Any representations, however, “were made before the execution of all contracts” and the court, “interpret[ing] the contracts as the final documents and agreements amongst these parties . . . enforce[d] them as *written and signed*” and did not enforce the alleged earlier promise. (*Id.* at p. 1358.)

Celsi asserts the parol evidence rule should not bar his contract claims here because (1) H&R Block committed fraud in inducing him to sign the written agreement

and the parol evidence rule does not bar evidence of fraud, and (2) the parties' course of conduct shows they intended to enter a collateral oral agreement and the rule does not bar evidence of a course of conduct. Neither assertion has merit.

Although “[p]arol evidence is always admissible to prove fraud, including circumstances where a purportedly fraudulently induced contract contains relevant exculpatory language, or integration clauses” (*Hartman v. Shell Oil Co.* (1977) 68 Cal.App.3d 240, 251), there must at least be a *fraud* claim at issue. As Celsi concedes in his reply brief, *Hartman* involved a fraud claim, not a contract claim, and noted “parol evidence” would not be allowed “for the purpose of ‘adding’ provisions to [a] franchise agreement.” The claims in the instant case are contract based. Accordingly, while *Hartman*'s facts are similar to those alleged here, it dealt with an entirely different kind of cause of action and is inapposite. (Cf. *Kett v. Graeser* (1966) 241 Cal.App.2d 571, 574 [the fraud exception is a device for “bringing [an] action in tort rather than on contract”].) Furthermore, the fraud exception “does not apply where, as here, parol evidence is offered to show a fraudulent promise directly at variance with the terms of the written agreement.” (*Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1009.) As already discussed, the alleged oral promise to reserve Arcata was squarely at odds with the written agreement, which specified the extent of Celsi's territory.

Celsi's claimed “course of conduct” evidence is H&R Block's choice to reap the benefits of Celsi developing and serving customers from Arcata. This was no assurance, however, Celsi would garner exclusive rights to the Arcata territory. Celsi also misunderstands what course of conduct evidence can accomplish. Evidence of a course of conduct or usage is not meant to “ ‘alter [a] contract of the parties, but on the contrary [to] give[] . . . effect to the words there used as intended by the parties. The usage becomes a part of the contract in aid of its correct interpretation.’ ” (*Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc.* (1955) 135 Cal.App.2d 40, 48.) Celsi is not asking us to interpret a term of the Satellite Franchise Agreement; rather, he is asking us

to add a new term granting him the Arcata territory. That is beyond what “course of conduct” evidence can achieve. (See *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, 1172 [extrinsic evidence to explain the meaning of a written instrument is admissible only if relevant to proving a meaning to which the instrument is reasonably susceptible].)

The parol evidence rule is a longstanding, well-known principle that promotes fairness and predictability by encouraging parties to specify the entirety of their agreements in writing. The policy is “based on the assumption that written evidence is more accurate than human memory” and “the fear that fraud or unintentional invention by witnesses interested in the outcome of the litigation will mislead the finder of facts.” (*Masterson v. Sine* (1968) 68 Cal.2d 222, 227.) Celsi negotiated with H&R Block to obtain the McKinleyville territory in writing. If he wanted assurances about Arcata he likewise needed them in writing.

**DISPOSITION**

The judgment is affirmed. Respondents to recover costs.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.