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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of MARCIA FLAGG-
MALEK and NADER MALEK.

MARCIA FLAGG-MALEK,

Appellant,

v.

NADER MALEK,

Respondent;

BROADMOOR COMMUNITY
CHURCH,

Claimant and Appellant.

A133231

(Contra Costa County
Super. Ct. No. MSD08-02808)

Marcia Flagg and Broadmoor Community Church (BCC) appeal from an order and judgment in this dissolution action (a) sanctioning Flagg for failing to list on her schedule of assets a promise by BCC to retroactively pay her \$105,000 for past work and (b) requiring BCC to pay Nader Malek, Flagg’s former husband, \$105,000. As we explain, the promise to pay \$105,000 was never a viable community asset, contingent or otherwise. Rather, the promise was an unenforceable “expectancy” that Flagg was not required to include in her schedule of assets. Therefore, the sanction against her cannot stand, nor can the judgment against BCC requiring it to pay the monies to Malek. We note that had Flagg actually received the monies, she would have had an asset in-hand

she was required to disclose and to which Malek would have had a partial claim. However, she never received any of the monies and consequently never had anything more than an expectancy, which neither she nor Malek ever had any right to enforce. We therefore reverse the sanction order against Flagg for failing to disclose the supposed asset and the judgment against BCC requiring it to disgorge it.

FACTUAL AND PROCEDURAL BACKGROUND

Flagg and Malek married in September 1996. Just a few months earlier, in June 1996, BCC hired Flagg as its pastor. The employment agreement provided “[t]he position [was] half-time.” Six years later, in August 2002, BCC and Flagg signed an amended employment agreement increasing her compensation. The agreement stated Flagg was “now 3/4 time.” According to Flagg, BCC fully met its obligations under these agreements and owed her no further compensation.

Despite this, five years later, on August 26, 2007, the eight remaining members of the dwindling BCC congregation passed a resolution stating Flagg, having worked at BCC for “part time pay[] for full time work” without a cost of living or merit-based raise since 1996, would be “*retroactively* compensate[d]” for what BCC “owe[d] her *for the last 10 and 1/2 years*” in the amount of \$105,000. (Italics added.) This was to be paid, however, only upon sale of BCC’s church facility, which BCC then authorized. Flagg, herself, authored the August 2007 resolution. Although Flagg told Malek “the church was going to pay her some past-due compensation,” she did not show Malek the August 2007 resolution.

The following year, on April 28, 2008, Flagg and Malek separated. Flagg commenced this dissolution action on June 18, 2008.

On July 14, 2008, Flagg served Malek with a mandatory disclosure of assets and debts. She did not list as an asset the August 2007 resolution promising \$105,000 in retroactive compensation upon sale of the church property.

Five months later, on November 23, 2008, the remaining members of BCC passed a second resolution declaring the August 2007 resolution a nullity. The church property had not been sold, and the resolution stated, “after reviewing [its] contractual financial obligations with” Flagg, BCC had kept its obligations to her and did “not by contract owe her *past* compensation.” Flagg did not inform Malek of this second resolution.

After several failed attempts, BCC finally sold the church facility for \$1.3 million. Due to the precipitously declining real estate market, this price was much lower than had been hoped and the sale terms were unconventional. BCC obtained \$500,000 cash and an \$800,000 promissory note. After paying debts, the sale netted BCC only \$349,000 in cash and the note, which generated approximately \$6,900 a month. Although BCC continues to exist, its operations are limited. Flagg continues to perform pastoral duties as needed and administers the BCC-related Heaven Sent day care center. By virtue of the note, she continues to be paid for her ongoing work. As far as the record shows, Flagg has never received any “retroactive” compensation under the rescinded August 2007 resolution or otherwise.

Two years after the dissolution action was filed, Malek, on March 10, 2009, moved to join BCC in the proceedings, asserting he had a right to half of Flagg’s retroactive compensation to which she was assertedly entitled under the August 2007 resolution. The family law court allowed the joinder, and on April 24, 2009, Malek filed a verified complaint against BCC. He alleged BCC had agreed, by the resolution of August 26, 2007, “to pay [Flagg] the sum of \$105,000 as and for retroactive compensation for professional pastoral services rendered to [BCC] from 1996 to August 2007.” His complaint contained no labeled causes of action, but further alleged BCC had “wrongfully denied the existence of the asset” and “wrongfully possesses and detains the asset,” and had colluded with Flagg to thwart his interest. Malek sought an order determining his and Flagg’s interests in the money and other injunctive relief aimed at protecting his interests.

Also on April 24, 2009, and in conjunction with Malek's complaint, the clerk issued a summons to BCC. The summons warned BCC it might face default if it failed to respond within 30 days. It further notified "the person [being] served" that "[y]ou are served" on "behalf of: Broadmoor Community Church." The summons then had a series of checkboxes to specify which statute service was under. "Other" was checked, while "CCP 416.10 (Corporation)" was not.

On June 16, 2009, Malek filed a proof of service of the summons and complaint. Flagg, as it turns out, was BCC's registered agent for service of process. According to Malek's proof of service, seven attempts to serve Flagg personally failed. Accordingly, on May 8, 2009, the process server left the summons and complaint with a "Manger/co Worker" working at BCC's address, Laura Boaz. The process server then mailed the documents to Flagg.

BCC did not file a response, and on June 16, 2009, Malek's attorney signed a request for entry of default. The request was mailed to Flagg on June 18, 2009, and filed on June 19, 2009. The clerk entered default on the date of filing, June 19, 2009.

Meanwhile, on the morning of June 18, 2009—one day before entry of default—Malek had filed for chapter 7 bankruptcy. He listed his claimed community interest in the \$105,000 retroactive compensation as a "liquidated debt[]," stating it was "unknown if collectable." On that same day, his attorney wrote to counsel for BCC, recapping an earlier phone conversation: "it is our mutual understanding that the Superior Court proceedings in the Malek matter have been stayed as a result of [Malek's] bankruptcy filing." Counsel continued "I will refrain from causing the notice of entry of default as to [BCC] from being filed with the Court (it is my understanding that the Court Clerk has the notice in her possession, but it was not yet filed)." Nevertheless, BCC's default was entered.

During Malek's bankruptcy, the dissolution action languished, but was not entirely inactive. On July 21, 2009, the court entered a judgment as to status, ending the marriage

and fixing a separation date, but reserved other issues, including property division. Despite the entry of default, counsel for BCC made an appearance at the July 21 hearing, and neither the family law court nor Malek complained.

Following resolution of Malek's bankruptcy case in late 2010, trial was set in this action on the reserved issues for March 15, 2011. On March 11, 2011, BCC, after receiving Malek's trial brief, moved to set aside the long-standing entry of default. BCC claimed it's default resulted from mistake, inadvertence, or excusable neglect and Malek would suffer no prejudice from allowing it to participate in the upcoming trial—in fact, BCC claimed it participated in discovery, producing documents and making its witnesses available for deposition. BCC, on March 15, also filed a trial brief. The brief asserted, albeit in cursory fashion, that the August 2007 resolution reflected an illusory gift and was not an enforceable agreement to pay Flagg anything.

When counsel for BCC appeared on the scheduled trial date, the court refused to allow the church to participate: "Your client is in default, and you are not going to be participating in the trial." The family law court noted BCC's motion to set aside the default had been calendared for an April hearing and the church had not requested an order shortening time. Trial proceeded, and the court took the matter under submission.

The following month, on April 21, 2011, the court heard and denied BCC's motion to set aside its default. The court was troubled by BCC's failure to show it never received, or had difficulty receiving, notice of entry of default: "That's a problem."

Three months later, on July 20, 2011, the court filed its statement of decision on the reserved issues. With respect to Malek's claim against BCC, the court concluded BCC's default ipso facto meant it owed \$105,000 to the community. Ordinarily, Malek would be entitled to only half that amount as his community share. The court awarded the whole amount to him, however, as a sanction against Flagg for taking "dishonest and underhanded steps, in collusion with BCC's membership, to try and convince [husband] and the Court that the asset did not validly exist to start with." In particular, the family

law court pointed to the November 2008 resolution, which the court described as secretive and collusive, revoking the August 2007 resolution, and to Flagg’s failure to disclose the 2008 resolution, which the court characterized as being in bad faith. The sanctions were ostensibly based on Family Code section 1101, subdivision (g)¹ and “general principles of equity.” At no point did the court address whether the August 2007 resolution ever gave rise to a valid and binding compensation agreement, which Flagg, let alone Malek, could enforce.

On July 26, 2011, the court entered judgment for Malek and against BCC in the amount of \$105,000. Flagg and BCC each appealed on September 20, 2011.²

DISCUSSION

Sanction Against Flagg

The sanction against Flagg—awarding the \$105,000 of promised “retroactive” compensation to Malek—is grounded on Flagg’s failure to list the promised amount on the mandatory disclosure of assets and debts form. The family law court viewed Flagg’s failure to include the promised amount as an attempt to conceal the “asset,” although it is undisputed Malek knew about the promise when it was made.

The Family Code’s asset disclosure requirements (§ 2100 et seq.) require spouses to make preliminary and final disclosures of “all assets and liabilities in which one or both . . . may have an interest.” (§ 2103.) An asset, for these purposes, “includes, but is not limited to, any real or personal property of any nature, whether tangible or intangible, and whether currently existing or contingent.” (§ 2101, subd. (a).)

¹ Family Code section 1101, subdivision (g), allows allocating 50 percent of an asset—not 100 percent—as a sanction. (Fam. Code, § 1101, subd. (g).) Subdivision (h) allows a 100 percent allocation as a sanction in cases where exemplary damages would be allowed. (*Id.*, subd. (h).) All further statutory references are to the Family Code unless otherwise indicated.

² On September 27, 2011, BCC also filed a motion to vacate judgment, on which the court has not ruled on because of the pendency of this appeal.

We are concerned here with the meaning of “contingent” asset. A contingent interest is an enforceable “contractual right” upon the occurrence of a future condition. (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 845 (*Brown*)). For example, an employer’s promise of pension benefits as deferred compensation for ongoing work creates a contingent interest. The benefits “ ‘do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee.’ ” (*Id.* at p. 845.) “The employee’s right to such benefits is a contractual right, derived from the terms of the employment contract.” (*Ibid.*) Similarly, an employer’s contractual promise to award a bonus for reaching certain productivity targets creates an enforceable contingent interest in the bonus—an “asset” requiring disclosure under the Family Code. (Cf. *In re Marriage of Nelson* (1986) 177 Cal.App.3d 150, 157-158 (*Nelson*) [comparing the right to a bonus “contingent solely upon continued employment” with a gratuitous bonus an employer might or might not bestow at will].)

Contingent interests, however, are distinguishable from “expectancies.” (See Civ. Code, § 700 [“A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind.”].) “ ‘The term expectancy describes the interest of a person who merely foresees that he might receive a future beneficence, such as the interest of an heir apparent [citations], or a beneficiary designated by a living insured who has a right to change the beneficiary [citations]. . . . The defining characteristic of an expectancy is that its holder has *no enforceable right* to his beneficence.’ ” (*In re Marriage of Spengler* (1992) 5 Cal.App.4th 288, 298 (*Spengler*); see also *Brown, supra*, 15 Cal.3d at p. 844-845.) Other examples of an expectancy include the renewal right under a life insurance policy which, though having “potential value,” gives the insured spouse no “right . . . to enforce that value” and “is not ‘property’ within the meaning of the community property laws.” (*Spengler, supra*, 5 Cal.App.4th at p. 299; see also *In re Marriage of Havins* (1996) 43 Cal.App.4th 414, 421.) Returning to the example of an employment bonus—a bonus that may be typically given annually, but is not

contractually assured, is an unenforceable expectancy, not an enforceable contingent interest. (*Nelson, supra*, 177 Cal.App.3d at pp. 157-158; see also *In re Marriage of Frahm* (1996) 45 Cal.App.4th 536, 544-545 [postdissolution severance payment that “resulted solely from [employer’s] beneficence” was not property for purposes of community property law].)

Given that the Family Law distinguishes between “expectancies,” which are not legally enforceable and need not be disclosed on a schedule of assets, and “contingent interests,” which are enforceable if the contingency comes to pass and thus do need to be disclosed, we turn to whether BBC’s August 2007 resolution gave rise to an unenforceable expectancy or to an enforceable contingent interest.³

To be enforceable, a promise must be supported by legally sufficient consideration. “California courts have repeatedly refused to enforce gratuitous promises, even if reduced to writing in the form of an agreement.” (*Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1249.) “[T]he consideration for a promise must be an act or a return promise, bargained for and given in exchange for the promise.” (*Simmons v. California Institute of Technology* (1949) 34 Cal.2d 264, 272 (*Simmons*); see also *Passante v. McWilliam* (1997) 53 Cal.App.4th 1240, 1247 (*Passante*) [for an enforceable promise, a plaintiff must give consideration and it “must result from a bargain”].)

The requirement of a bargained-for exchange of consideration and promise means “[p]ast consideration cannot support a contract.” (*Passante, supra*, 53 Cal.App.4th at p. 1247; see also *Simmons, supra*, 34 Cal.2d at p. 272; accord, *Patriot Scientific Corp. v. Korodi* (S.D. Cal. 2007) 504 F.Supp.2d 952, 960-961.) Thus, in *Passante*, a corporation’s promise to pay the plaintiff corporate stock for finding a crucial investor in the nick of time was not valid consideration when the corporation’s promise came *after*

³ Because in their briefs on appeal the parties did not address the enforceability of the August 2007 resolution, we asked for additional briefing on this issue pursuant to Government Code section 68081.

the plaintiff found the investor. (*Passante, supra*, 53 Cal.App.4th at pp. 1244-1245, 1247.) Likewise, in *Simmons*, a contract made “in consideration of employment” in fact lacked consideration because the phrase referred to *past* employment. (*Simmons, supra*, 34 Cal.2d at p. 272 [past employment “is inadequate consideration to support a contract”].) Similarly, in *Dow v. River Farms Co. of California* (1952) 110 Cal.App.2d 403, 404, 408, a resolution “promising to pay . . . \$50,000 for past services . . . was not intended to create any legal obligation at all” and a deceased husband’s wife could not enforce the promise.

The language of the August 2007 resolution, itself, states the contemplated payment to Flagg was to “*retroactively* compensate” her for *past* work. (Italics added.) There was no evidence Flagg agreed to continue working or to perform any additional work in exchange for the expressly retroactive pay. Malek, moreover, alleged in his verified complaint against BCC that the August 2007 resolution promised “to pay [Flagg] the sum of \$105,000 as and for *retroactive* compensation for professional pastoral services rendered to [BCC] *from 1996 to August 2007*” (italics added).

Thus, both the language of the August 2007 resolution and the operative allegations of Malek’s verified the complaint, in addition to the evidence adduced at trial concerning the resolution and BBC’s obligations to Flagg, demonstrate no legally enforceable promise was made.⁴ BBC’s promise to pay Flagg “retroactive”

⁴ BCC authorized sale of the church building by a separate resolution, also on August 26, 2007. That resolution also stated Flagg would be retained as pastor of the church and then hired to work at Heaven Sent daycare. It made no mention at all of compensation, let alone of the resolution passed at the same time and at issue here expressly promising Flagg “*retroactive*” pay for *past* work. Contrary to Malek’s argument, no inference can be reasonably drawn that contrary to the express terms of the resolution promising retroactive pay for past work, the sale resolution transformed that promise into one for deferred compensation for future work. Indeed, as we have noted, Malek’s own verified allegations were that the August 2007 resolution at issue was, as it expressly stated, a promise to pay retroactive compensation for past work.

compensation was simply that—a gratuitous promise that lacked consideration and which Flagg, herself, could not have enforced, even if the church had sold its property.

In short, all Flagg ever had was an unenforceable “expectancy.” Accordingly, the August 2007 resolution did not create any community asset, contingent or otherwise, to which either Flagg or Malek could lay claim.⁵ Flagg therefore did not run afoul of the Family Code disclosure requirements by not listing BBC’s August 2007 resolution embodying its gratuitous and unenforceable promise to her.

We further observe the promised “retroactive” compensation for past work was not only an unenforceable expectancy, but a contingent expectancy based on a sale of the church property, and no sale occurred before the November 2008 resolution rescinding the August 2007 resolution. Thus, during its one year duration, the August 2007 resolution was not only gratuitous, but additionally dependent on a condition that never occurred before it was rescinded.

Had Flagg *actually received* any or all of the promised amount—and thus changed from having a mere expectancy to having an asset in hand—a different set of principles would apply. In *Downer v. Bramet* (1984) 152 Cal.App.3d 837 (*Downer*), the Court of Appeal concluded the proceeds from the sale of a ranch the husband’s employer gave to the husband and several coworkers, during their employment, because the employer had no pension plan, were “[e]arnings . . . acquired as a result of the labor, skill and effort of a spouse during marriage are community property.” (*Id.* at pp. 843-844.) The court agreed the husband’s employment contract had not entitled him to the ranch and therefore the property was gratuitously given. But the fact the husband would not have been able to enforce the promise before it was fulfilled did not detract from the fact the employer had,

⁵ As we discuss in the next section, Malek and the family law court could not rely on the BCC’s default to establish that the August 2007 resolution created an enforceable community asset. (See *Western Heritage Ins. Co. v. Superior Court* (2011) 199 Cal.App.4th 1196, 1211 [admissions that may be implied from a party’s default ordinarily do not bind any other party].)

in fact, made the gift and the proceeds from the sale of the ranch were thus “acquired” as a result of the husband’s work during the marriage. (*Id.* at p. 840.)

Here, however, BBC never gave Flagg any or all of the promised retroactive compensation. Accordingly, unlike in *Downer*, Flagg never received any monies that could be characterized as having been “acquired” as a result of her employment and that could be physically shared with Malek. Indeed, the parties have cited no case, and we are aware of none, in which a family court has allowed a spouse to which a gratuitous promise has been made to force the promisor to make good on the promise, let alone, allowed the other spouse to enforce the promise. In fact, we are not aware of any case in any context in which a court has enforced a mere expectancy and required a promisor to fulfill a gratuitous promise.

The primary authority the family law court relied on to sanction Flagg was Family Code section 1101, which applies when one spouse’s breach of the fiduciary duty owed to the other “results in impairment to the claimant spouse’s present undivided one-half interest in the community estate.” (Fam. Code, § 1101, subd. (a).) However, as we have discussed, there was no viable community asset here, contingent or otherwise, and Flagg’s failure to list her unenforceable expectancy did not impair Malek’s interest in the community estate.

We understand the family court believed Flagg and the tiny congregation of BCC acted in cahoots in passing to the November 2008 resolution rescinding the August 2007 resolution to insure Malek had no claim against Flagg. But the motive for the November 2008 resolution does not change the *threshold* issue in regard to the August 2007 resolution—did the August 2007 resolution give rise to an enforceable contingent interest Flagg (and Malek and the family court) could enforce, or to an unenforceable expectancy. For the reasons we have explained, Flagg had only the latter.

Thus, even if the BCC congregation approved the November 2008 resolution out of less than charitable motives, the spirit with which that resolution was adopted is

irrelevant. (Cf. *In re Marriage of Lehman* (1998) 18 Cal.4th 169, 180 [“characterization of property, including the right to retirement benefits and retirement benefits themselves, as the community property of the employee spouse and the nonemployee spouse or the separate property of the employee spouse alone, does not turn on the motive of the employer”].) All the second resolution did was rescind a gratuitous and unenforceable promise—an expectancy—that had never been acted upon. Thus, it did not compromise or obscure any enforceable community asset because no such asset ever existed.

Default Judgment Against BCC

BCC challenges the entry of default and default judgment against it on a number of grounds, including that the automatic bankruptcy stay in Malek’s bankruptcy precluded entry of its default, it was not properly served, and the First Amendment’s “ministerial exception” barred the family court’s ruling on a church employment matter. We need not and do not reach any of these issues since we conclude the default judgment against BCC was erroneous for a more fundamental reason—Malek’s complaint failed to state a claim. As noted in the preceding section, even accepting the allegations of Malek’s verified complaint as true, he alleged facts that precluded him from recovering the \$105,000 promised by the August 2007 resolution and which the default judgment awarded.

A “ ‘*judgment by default* is said to ‘confess’ the material facts alleged by the plaintiff, i.e., the defendant’s failure to answer has the same effect as an express admission of *the matters well pleaded in the complaint.*” ’ (Steven M. Garber & Associates v. Eskandarian (2007) 150 Cal.App.4th 813, 823 . . . , second italics added.) The ‘well-pleaded allegations’ of a complaint refer to ‘ ‘ ‘all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.’ ” ’ (Evans v. City of Berkeley (2006) 38 Cal.4th 1, 6 . . . , quoting Serrano v. Priest (1971) 5 Cal.3d 584, 591)” (Kim v. Westmoore Partners, Inc. (2011) 201 Cal.App.4th 267, 281 (Kim).)

“Because the default *confesses* those properly pleaded facts, plaintiff has no responsibility to provide the court with sufficient evidence to prove them—they are treated as true for purposes of obtaining a default judgment. (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1746) But that is all the default does. There is no penalty for defaulting. ‘A defendant has the right to elect not to answer the complaint. (*Greenup v. Rodman* [(1986)] 42 Cal.3d [822,] 829) Although this may have been a tactical move by defendant, it is a permissible tactic.’ (*Stein v. York* (2010) 181 Cal.App.4th 320, 325)” (*Kim, supra*, 201 Cal.App.4th at pp. 281-282.)

“And if the well-pleaded allegations of the complaint do not state any proper cause of action, the default judgment in plaintiff’s favor cannot stand. On appeal from the default judgment, ‘[a]n objection that the complaint failed to state facts sufficient to constitute a cause of action may be considered.’ (*Bristol Convalescent Hosp. v. Stone* (1968) 258 Cal.App.2d 848, 859; see *Martin v. Lawrence* (1909) 156 Cal. 191) Moreover, ‘[w]hen considering the legal effect of those facts, we disregard any erroneous or confusing labels employed by the plaintiff.’ (*Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 564, citing *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908)” (*Kim, supra*, 201 Cal.App.4th at p. 282.) We also keep in mind “ ‘the law strongly favors trial and disposition on the merits.’ ” (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 371-372.)

We therefore look, at this point in our analysis, only at Malek’s complaint to see if it states a claim and do not consider the evidence presented at trial, in which BCC did not participate because of its default. As we have already pointed out, Malek’s verified complaint alleged BCC agreed, by the resolution of August 26, 2007, “to pay [Flagg] the sum of \$105,000 as and for *retroactive* compensation for professional pastoral services rendered to [BCC] *from 1996 to August 2007*” (italics added). The complaint further alleged BCC, by refusing to make payment, had “wrongfully denied the existence of the asset” and continued to “wrongfully possess[] and detain[] the asset.” As we have also

already explained, Malek alleged only a promise unsupported by any consideration, and thus failed to allege any valid and legally enforceable community property right. He therefore failed to state a claim against BCC.⁶

In his supplemental brief, Malek cites Civil Code section 1614, which provides “[a] written instrument is presumptive evidence of a consideration,” and contends BCC had the burden of pleading and proving lack of consideration, which it did not do. (See *National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 808 [generally lack of consideration an affirmative defense]; *Brooks v. Fidelity Savings & Loan Assn.* (1938) 26 Cal.App.2d 114, 117-118.) To begin with, BCC never had the opportunity to file an answer, since it suffered a default, and we are therefore left to examine only the verified allegations of the complaint. (We note BCC’s proffered trial brief did, in fact, raise the consideration issue.) Furthermore, the presumption of adequate consideration applies “*unless* the terms of the agreement are such as to exclude or forbid such assumption.” (*Vickrey v. Maier* (1912) 164 Cal. 384, 388, italics added; accord, *Brooks, supra*, 26 Cal.App.2d at pp. 116-117, quoting *McCarty v. Beach* (1858) 10 Cal. 461, 463.) Thus the presumption created by section 1614 is compatible with another longstanding principle: that when a litigant includes allegations that foreclose the asserted claim, it has “pleaded itself out of court.” (*Grossmont Union High School Dist. v. State Dept. of Education* (2008) 169 Cal.App.4th 869, 886.) As we have discussed, Malek alleged in his own verified complaint that the promised \$105,000 was in exchange for “professional pastoral services rendered. . . *from 1996 to August 2007*,” i.e., for *past* work, which is, as a matter of law, inadequate consideration. (Italics added.) Finally, the statutory presumption, by its terms, applies only to “written instruments,” and BBC’s resolution—never signed by Flagg and to which Flagg (as Malek also alleged) was only a

⁶ We also note, as discussed in the preceding section, the evidence at trial only corroborated the absence of consideration for the August 2007 purported promise of retroactive compensation.

“third party beneficiar[y]”—lacks the indicia of a formal written instrument. (See *Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1112 [“The term ‘written instrument’ as it appears in that statute, however, does not apply to letters, but only to more formal legal documents.”]; *Foltz v. First Trust & Savings Bank of Pasadena* (1948) 86 Cal.App.2d 59, 62 [“the document signed by decedent was merely a letter written by him to plaintiff in which he made certain promises” not an “instrument”]; *Bevis v. Murphey* (1932) 127 Cal.App. 518, 520-521 [“receipt upon which the appellants rely in this case is not a written instrument between the parties, but is only a receipt for money on account signed by one of the parties”].)

In sum, Malek’s own allegations foreclosed his claim against BBC, and the default judgment against BBC most therefore be reversed. Further, on remand, judgment must be entered for BCC. “ ‘ “When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff’s cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence Certainly, where the plaintiff’s evidence is insufficient as a matter of law to support a judgment for plaintiff, a reversal with directions to enter judgment for the defendant is proper.” ’ (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919 . . . , quoting *McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661 . . . [fn. omitted]; accord, *Avalon Pacific–Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC* (2011) 192 Cal.App.4th 1183 . . . ; *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 833)” (*Kim, supra*, 201 Cal.App.4th at p. 289.)

Certainly Malek had to show the \$105,000 of purported retroactive compensation was a community asset in order to argue Flagg should be sanctioned for concealing it. (See *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1430.) However, as we have discussed, he did not carry his burden of making this showing—nor, given the allegations of his complaint, let alone the evidence adduced at trial, could he ever make such a

showing. The August 2007 resolution was a gratuitous and legally unenforceable promise—it did not create, even for the one year it existed before it was rescinded, any viable community property asset.

DISPOSITION

The sanction against Flagg in connection with the disclosure of the promised retroactive compensation provided by the BCC’s August 26, 2007, resolution is reversed. The judgment against BCC is also reversed, and on remand, the trial court is to enter judgment in favor of BCC and against Malek on his claims against BCC. Parties to bear their own costs on appeal.

Banke, J.

We concur:

Marchiano, P. J.

Dondero, J.