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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ANGEL JUAREZ,

Plaintiff and Appellant,

v.

AGUSTIN RAMIREZ et al.,

Defendants and Respondents.

B238404

(Los Angeles County  
Super. Ct. No. BC469237)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard E. Rico, Judge. Affirmed.

Lopez & Associates, Anthony R. Lopez; Menchaca Law Firm and Alejandro Menchaca for Plaintiff and Appellant.

Steven J. Eyre for Defendants and Respondents.

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After Angel Juarez twice unsuccessfully attempted to enforce a stipulation for entry of judgment between Agustin Ramirez and Horacio Ramirez (collectively, Ramirezes) on the one hand and Juarez on the other, filed in 2000, Juarez filed a new complaint in 2011 against the Ramirezes for breach of contract, open book account, and account stated based on the stipulation. Thereafter, the trial court sustained the Ramirezes' demurrer to the complaint on the basis that it was barred by the statute of limitations. Juarez appeals, contending that the cause of action for breach of contract was not barred by the statute of limitations because the parties made oral modifications that extended the term for performance of the stipulation until 2009 when a payment was made pursuant to the modifications, or until 2010 when Juarez was terminated as the manager of the Ramirezes' band, Los Caminantes (band). Juarez also argues that the modifications did not need to be in writing because eight partial payments constituted executed oral agreements and the oral modifications fell outside the statute of frauds. Juarez further contends that the causes of action for open book account and account stated were not barred by the statute of limitations because the Ramirezes' continued payments "gave rise to an executed oral agreement." Juarez finally argues that because he can amend the complaint to allege valid causes of action, the court erred in sustaining the demurrer without leave to amend. We conclude that the complaint was barred by the statute of limitations and that the court did not abuse its discretion in sustaining the demurrer without leave to amend. We affirm the judgment.

## **BACKGROUND**

### **The 2011 Complaint**

On September 8, 2011, Juarez filed a complaint against the Ramirezes for breach of contract, open book account, and account stated (2011 complaint), alleging as follows. On September 16, 1998, Juarez filed a complaint for breach of a promissory note against the Ramirezes and Humberto Navarro (*Juarez v. Ramirez et al.* (Super. Ct. L.A. County 2001, No. BC197597)). In April 2000, Juarez on the one hand and the Ramirezes and Navarro on the other entered into a "Stipulation For Entry of Judgment and Settlement Agreement" (stipulation). The stipulation was attached to the 2011 complaint and

provided as follows. The Ramirez and Navarro, as members of the band, agreed to perform 17 concerts between February 11, 2000, and February 11, 2001. In the event the Ramirez and Navarro failed to “complete the dates” within one year, “judgment shall be entered in favor of [Juarez] and against [the Ramirez and Navarro] for the amount of \$5,000.00 for each date not performed plus interest at the rate of 10% from September 15, 1998.” The stipulation provided that if the Ramirez and Navarro “breach[ed] this agreement by not performing as agreed, [Juarez] may file this stipulation, and [the Ramirez and Navarro] waive notice of hearing.” It was also stipulated that “after a total of 17 performances have been completed within the year, or such other time frame as may be later agreed upon by the parties, this case will be dismissed with prejudice.”

The Ramirez and Navarro did not perform concerts during the specified time frame and “agreed that they would make payments and that the performances could be made outside the time period from February 11, 2000 to February 11, 2001.” “On . . . February 1, 2001, [the Ramirez] and Navarro reaffirmed that [the Ramirez] and Navarro owed Juarez \$85,000.00 plus interest from September 15, 1998 and that in the event that [the Ramirez] could not perform and/or make a full payment, including interest pursuant to the [stipulation], Juarez would extend the term to accept payments and accept partial payments during such time that Juarez served as [the Ramirez’s] manager.” Juarez managed the Ramirez and Navarro “from 2001 to 2005 and . . . from October 2009 to February 10, 2010.”

“On or about September 4, 2004, . . . it was further agreed by Juarez and [the Ramirez and Navarro] that the term of the agreement to repay the principal and interest amount pursuant to the [stipulation] was extended until Juarez would not serve as the manager of the [Ramirez] and Navarro” and that “Juarez would accept a partial payment during such time that Juarez served as [the Ramirez] and Navarro’s manager.” The Ramirez and Navarro made 12 payments between September 5, 2004, and September 6, 2005, totaling \$28,000. The payments ranged in amounts between \$1,000 and \$4,000. By September 2005, Juarez was “no longer” the manager for the Ramirez

and Navarro. “Juarez immediately demanded in multiple phone conversations and in person, that [the Ramirezes] and Navarro to [sic] pay Juarez the balance owed. Over the course of several years, these conversations concerning payment were frequent, and each time Juarez raised [sic] regarding payment, Juarez was assured by the [Ramirezes] that payment would be forthcoming.” When Juarez again agreed to manage the Ramirezes and Navarro in October 2009, the Ramirezes and Navarro “reaffirmed that \$136,767.12 was owed to Juarez pursuant to the [stipulation] and that [the Ramirezes] and Navarro would pay Juarez a payment of \$1,000.00 and . . . it was agreed [that] the time to repay would be [extended] until Juarez would stop serving as [the Ramirezes’] manager and the full balance due and owing would come due.”

On December 3, 2009, the Ramirezes and Navarro made a payment of \$1,000 to Juarez. Juarez stopped managing the band in February 2010 and again made a demand for payment. The Ramirezes and Navarro did not make any further payments to Juarez. Navarro died on June 5, 2011. The Ramirezes became indebted to Juarez on an open book account, and Juarez kept an account of the debits and credits of the amounts owed by the Ramirezes to Juarez. Within the last four years, an account was stated by and between Juarez and the Ramirezes, in which it was agreed that the Ramirezes “are” indebted to Juarez. “The court did not retain jurisdiction pursuant to California Code of Civil Procedure § 664.6 to enforce the [stipulation].”

The 2011 complaint sought the principal amount of \$56,000 plus interest in the amount of \$84,797.81, for a total of \$140,797.81.

### **The demurrer**

On October 11, 2011, the Ramirezes filed a demurrer, which was sustained by the trial court without leave to amend. In the demurrer, the Ramirezes pointed out that Juarez had made two unsuccessful attempts to enforce the stipulation for entry of judgment in the first action. The two attempts were described as follows. On January 10, 2011, Juarez filed a motion to enforce the stipulation, attaching the declaration of Juarez, which stated that the Ramirezes and Navarro had breached the stipulation by failing to perform any of the 17 performances and had “made only fourteen insufficient payments.”

In its minute order taking the motion to enforce the stipulation off calendar, the court noted, “Per [Juarez], there was an oral agreement to extend the time to perform, but this was not set forth in the moving papers. [¶] There is nothing that shows the case was dismissed with retention of jurisdiction, or simply dismissed without prejudice.” On July 12, 2011, Juarez filed a second motion to enforce the stipulation. In its minute order taking the motion off calendar, the court noted that no appearances had been made in the matter.

The Ramirezzes argued in their demurrer that the breaches of the stipulation occurred in February 2001 and September 2005 and that therefore the 2011 complaint was barred by the two-year statute of limitations for breach of oral contract, four-year statute of limitations for breach of written contract, and four-year statute of limitations for open book account and account stated. The Ramirezzes also asserted that they had not waived the statute of limitations.

In opposition to the demurrer, Juarez argued that the statute of limitations did not begin to run on the claim for breach of contract until February 2010, when Juarez was terminated as the band’s manager. Juarez argued that the parties modified the stipulation multiple times, extending the band’s performances beyond February 2001; agreeing on a payment of \$5,000 for each performance missed rather than having the judgment entered; agreeing to extend the term to accept payments for as long as Juarez “served as” manager; agreeing to extend the term to accept payments until Juarez “would not serve” as manager; agreeing to extend the term to pay when Juarez stopped managing the band in 2005; and agreeing to extend the term while Juarez “served as” the band’s manager when he returned to manage the band in October 2009. Juarez argued that when he was terminated in February 2010, the Ramirezzes and Navarro “confirmed” “that full payment was now due” and the statute of limitations began running at that time. Juarez also argued that the statute of limitations began to run in December 2009 on the causes of action for open book account and account stated when the Ramirezzes and Navarro made a payment.

The trial court held that the cause of action for breach of contract was barred by the statute of limitations. The court noted that the 2011 complaint did not allege that the Ramirezes signed a written waiver to the statute of limitations and that although Juarez argued that the stipulation was orally modified, the 2011 complaint did not allege that the parties “ever executed their oral agreement to modify the [s]tipulation.” The court also held that the claims for open book account and account stated were barred by the statute of limitations. The court rejected the Ramirezes’ argument that the statute of limitations began to run from December 2009 when the Ramirezes made a payment to Juarez, noting that the 2011 complaint did not allege the stipulation was modified by a written agreement or an executed oral agreement. The court refused to allow Juarez leave to amend the 2011 complaint to allege fraud, concluding that Juarez was not able to allege facts sufficient to support a fraud cause of action. Also, the court refused to allow Juarez leave to amend the 2011 complaint to allege that in 2009, Juarez agreed to manage the Ramirezes in consideration for the Ramirezes’ payment for his services and the money owed to Juarez. The court noted that because Juarez did not claim the alleged 2009 agreement was in writing, or that the alleged 2009 agreement could be performed within a year, Juarez was unable to state a claim for a novation, which “must [be] in writing if of a type required by the Statute of Frauds to be in writing.” Juarez appealed.

## **DISCUSSION**

### **A. Standard of review**

“In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its

discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “With these considerations in mind, we review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under *any* legal theory.” (*Westinghouse Electric Corp. v. Newman & Holtzinger* (1995) 39 Cal.App.4th 1194, 1199.)

**B. The breach of contract cause of action was barred by the statute of limitations**

Juarez contends that the breach of contract cause of action was not barred by the statute of limitations because the parties’ oral modifications extended the term for performance of the stipulation until 2009 when a payment was made or until 2010 when Juarez was terminated as the manager of the band. He also argues that the modifications did not need to be in writing because eight partial payments constituted executed oral agreements and the oral modifications fell outside the statute of frauds. We disagree and conclude that the breach of contract cause of action is barred by the statute of limitations.

The statute of limitations for breach of a written contract is four years. (Code Civ. Proc., § 337.) In certain circumstances, a written contract may be modified by an oral agreement. Civil Code section 1698 provides, “(b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties. [¶] (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions. [¶] (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.”

“An executed contract is one, the object of which is fully performed. All others are executory.” (Civ. Code, § 1661.) In order to be executed, “an agreement must be fully performed on both sides. [Citations.]” (*Lockheed Missiles & Space Co. v. Gilmore Industries, Inc.* (1982) 135 Cal.App.3d 556, 559.) While “an offer may be accepted by

the commencement of performance, this does not mean there is an ‘executed’ agreement.” (*Ibid.*)

Although Juarez argues on appeal that the parties orally modified the stipulation several times, we conclude that the 2011 complaint did not allege that the parties fully executed oral agreements that modified the stipulation. Juarez claims that the parties orally agreed that the dates for the band’s performances were extended beyond February 2001; agreed on a payment of \$5,000 for each performance missed instead of entering judgment; agreed that if the Ramirezes could not perform or make a full payment, to extend the term to accept payments for as long as Juarez “served as” manager; agreed in September 2004 to extend the term to accept payments until Juarez “would not serve” as manager; agreed to extend the term to pay when Juarez stopped managing the band in 2005; and agreed to extend the term for partial payments while Juarez “served as” the band’s manager when he returned to manage the band in October 2009. But the 2011 complaint did not allege that the Ramirezes fully performed their part of the alleged oral agreements to play at concerts and to pay Juarez. At most, the 2011 complaint alleged that the Ramirezes made partial payments on what they owed Juarez under the stipulation. Accordingly, we reject Juarez’s argument that the statute of limitations began to run in 2009 or in 2010, when he claims the alleged modified oral contract was breached.

And we do not agree with Juarez’s further argument that if the alleged breaches occurred in February 2001 and in September 2005, the modifications did not need to be in writing because eight payments made after February 15, 2005, constituted executed oral agreements. As noted, the 2011 complaint did not allege that the Ramirezes fully performed their part of the alleged oral agreements to perform concerts or to pay Juarez and therefore failed to state facts sufficient to constitute a cause of action. And we are not convinced by Juarez’s one-line argument, unsupported by authority, that because there was no agreement that the concerts and payments would “take more than a year to accomplish,” no writing was required pursuant to the statute of frauds.

Accordingly, because pursuant to the allegations in the 2011 complaint the statute of limitations began to run on the breach of contract cause of action when the stipulation was breached in 2001, we conclude that the trial court properly sustained the demurrer to the cause of action for breach of contract.

**C. The account stated and open book account causes of action were barred by the statute of limitations**

Juarez contends that the causes of action for open book account and account stated were not barred by the statute of limitations because the Ramirez's continued payments "gave rise to an executed oral agreement." We disagree.

Code of Civil Procedure section 337 provides for a four-year statute of limitations for "2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgment of the account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided, however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item."

Without citation to authority, Juarez tersely argues that, assuming the statute of limitations expired in either 2005 or 2009, the Ramirez's continued payments "gave rise to an executed oral agreement." But as noted, the 2011 complaint does not allege that the oral agreements were executed fully and therefore failed to state facts sufficient to constitute the causes of action.

Because Juarez has made no cogent argument or cited pertinent authority that the stipulation and subsequent events supported causes of action for an account stated and open book account, and based on the allegations in the 2011 complaint, the statute of limitations began to run when the stipulation was breached in 2001, the trial court properly sustained the demurrer to the causes of action for account stated and open book account.

**D. The trial court did not abuse its discretion in denying Juarez leave to amend because there is not a reasonable possibility that the defect can be cured by amendment**

Juarez argues that the trial court erred in sustaining the demurrer without leave to amend. We disagree.

As we explain, because Juarez did not carry his burden of proving there is a reasonable possibility that the bar of the statute of limitations can be cured by amendment, we conclude that the trial court did not abuse its discretion in refusing to grant leave to amend to allege a novation or fraudulent concealment. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) “‘Novation is the substitution of a new obligation for an existing one.’ (Civ. Code, § 1530.) The substitution is by agreement and with the intent to extinguish the prior obligation. (Civ. Code, §§ 1530, 1531; [citation].) The substitution of a new obligation for an existing one may be either (1) a new obligation between the same parties, or (2) a new obligation arising because of new parties, either a new debtor or new creditor. (Civ. Code, § 1531; [citations].) ‘Novation is made by contract, and is subject to all the rules concerning contracts in general.’ (Civ. Code, § 1532.)” (*Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 431–432.)

Juarez proposes to amend the 2011 complaint to state that “in December 2009, [Juarez] agreed to manage [the Ramirez] in consideration for payment of his services and the \$136,767.12 owed to [Juarez].” But he fails to make a cogent argument or cite pertinent authority to show that a novation took place when the Ramirez agreed to pay an earlier debt as part of their consideration.

We also determine that the trial court did not abuse its discretion in refusing to allow Juarez leave to amend the 2011 complaint to allege that the Ramirez made fraudulent misrepresentations to Juarez in order to extend the time for repayment. *Investors Equity Life Holding Co. v. Schmidt* (2011) 195 Cal.App.4th 1519 states that under the fraudulent concealment doctrine, the applicable statutes of limitation will be tolled if the defendant, “‘by fraud or deceit concealed material facts and by misrepresentations hindered the plaintiff from bringing an action within the statutory

period.” (*Id.* at p. 1532.) “““[T]he plaintiff must show (a) the substantive elements of fraud, and (b) an excuse for late discovery of the facts. [Citations.]”” (*Id.* at p. 1533.) On appeal, Juarez proposes to amend the 2011 complaint to allege that the Ramirezes “simply kept [Juarez] on board as their manager in order to string him along and avoid payment” and that “[t]hey paid him a rate substantially lower than the \$5,000.00 which he was entitled to with the lure of continued employment with the band.” But these allegations do not allege that the Ramirezes concealed material facts and made representations that hindered Juarez from filing an action.

We conclude that the trial court did not abuse its discretion in denying Juarez leave to amend because there is not a reasonable possibility that the bar of the statute of limitations can be cured by amendment.

#### **DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.