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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

KENT H. LANDSBERG COMPANY,

Plaintiff and Respondent,

v.

BRYAN FREEMAN,

Defendant and Appellant.

C068067

(Super. Ct. No.
39200900231614CUBCSTK)

Kent H. Landsberg Company (KHL) negotiated the settlement of an existing debt owed by ice cream manufacturer Mollicoolz and its president, Bryan Freeman. One term of the written settlement agreement and corresponding promissory note required Mollicoolz and Freeman, “as an individual,” to pay \$45,000 on or before May 20, 2009. When the sum was not paid, KHL sued Mollicoolz and Freeman on four alternative causes of action: breach of contract, breach of promissory note, account stated, and money had and received. After KHL obtained a default judgment against Mollicoolz, KHL brought the instant motion for summary judgment (or, alternatively, for summary adjudication) against Freeman on all causes of action. The trial court granted KHL’s motion for summary judgment.

In this appeal, Freeman contends KHL was not entitled to summary adjudication on any of the four causes of action because he has a valid defense to KHL's claim to the \$45,000 sum: that the money was never owed. Additionally, because Freeman disputed ever receiving any money from KHL, Freeman argues summary judgment should not have been granted on KHL's claim for money had and received. Finally, Freeman argues, summary adjudication on all causes of action should have been denied because KHL's damages against Freeman could not be proved with certainty, inasmuch as its damages claim included attorney fees attributable to obtaining a default judgment against the other defendant, Mollicoolz.

Although we agree that the undisputed facts do not show that KHL is entitled to summary adjudication of its common count claims for account stated and money had and received, it *was* entitled to judgment in the amount of \$45,000 plus interest, late fees, and attorney fees and costs, based on its breach of contract and breach of promissory note causes of action. Accordingly, we shall affirm the judgment.

BACKGROUND

KHL sells supplies for packaging and shipping to companies throughout California. At all times relevant to this appeal, Mollicoolz was in the business of manufacturing and distributing ice cream products. In or about 2006 KHL provided Mollicoolz with certain packaging supplies and machinery for use in the manufacture and sale of its ice cream products. Freeman, the president and owner of Mollicoolz, signed a personal guaranty of Mollicoolz's debts to KHL.

By 2008 Mollicoolz's obligations to KHL were past due, and KHL had filed a lawsuit to enforce them. To resolve the then-pending lawsuit, Freeman agreed in a June 18, 2008, written "memorandum of agreement" (among other things) to sign a promissory note obligating Mollicoolz and himself "as an individual" to pay, on a schedule (1) the sum of \$205,252 "for the aged inventory being warehoused by KHL," described in paragraph 2 of the agreement and (2) a compromise sum of \$45,000 for the

“Schwans inventory,” described in paragraph 4 of the agreement. As to the \$45,000 sum, the agreement states Freeman agreed that it “must be paid in full no later than May 20, 2009.”

The promissory note signed by Freeman the following day declares that, for valuable consideration, Mollicoolz “and Bryan Freeman, as an individual,” collectively agree to pay both sums by their respective “due date.” It described the \$45,000 sum owed as the “secondary balance.” The promissory note also provides for interest and late charges on any installment due and unpaid under the note, and for attorney fees and costs incurred “[i]n the event any legal or equitable action is taken to enforce any of the provisions of this [n]ote.”

KHL ultimately brought the instant action and asserted causes of action against Mollicoolz and Freeman for breach of contract, breach of promissory note, account stated, and money had and received, seeking payment of the \$45,000 sum identified in the promissory note as the “secondary balance.” The June 2008 agreement and promissory notes were attached to the complaint and incorporated by reference. As to all claims, KHL alleged it entered into the agreement with Mollicoolz and Freeman by which they agreed to pay the \$45,000 sum; Mollicoolz and Freeman also signed a promissory note promising to pay that amount; KHL has fully performed under the agreement and note; and Mollicoolz and Freeman have neither disputed the amount owed nor paid the \$45,000 sum owed, plus interest, late fees and attorney fees.

Freeman answered the complaint, denied that he owes any amount to KHL, and raised various affirmative defenses. Mollicoolz did not answer; KHL took its default, and a default judgment for \$45,000, plus contractual late fees, prejudgment interest, and attorney fees, was subsequently entered against Mollicoolz.

KHL moved for summary judgment (or, alternatively, for summary adjudication) against Freeman. In support, it submitted the declaration of Bernardino A. Salvatore, the

president of KHL, who negotiated and prepared the agreement by which Freeman agreed to sign the promissory note.

In opposing the motion, Freeman contended his obligation to pay KHL the \$45,000 sum identified in the agreement and promissory note is excused because it was contingent on delivery and/or “receipt” of certain product, an event that did not occur. In his supporting declaration, Freeman averred that the \$45,000 payment “is not owed because KHL did not deliver a substantial amount of the product referred to in Paragraph 2 of the [agreement, generally, as ‘the Inventory’]. The value of this undelivered product was in excess of \$45,000.00. ¶ . . . Any amount that I owed under the Promissory Note was also conditioned upon receipt of the product referred to in Paragraph 2 of the Memorandum of Agreement and whether KHL had otherwise been paid.” Moreover, Freeman challenged KHL’s money had and received claim by averring that he “never received or obtained any money personally from KHL.”

Following a hearing, the trial court issued its “order on plaintiff’s motion for summary judgment” in which it concluded (1) KHL had, as a threshold matter, shown Freeman has no defense to any of its causes of action and no triable issue of fact exists, and (2) Freeman had not met his burden of proof to show, to the contrary, the existence of either a triable issue of fact as to KHL’s claims or a valid defense to them. (Code Civ. Proc., § 437c, subd. (g).) The court awarded KHL the principal sum of \$45,000, plus interest in the contract rate, late fees, and the entire amount of requested attorney fees and costs.

Freeman appeals.

DISCUSSION

I. Standard of Review

A motion for summary judgment must be granted if the submitted papers show there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826,

844.) The moving party, whether plaintiff or defendant, initially bears the burden of making a “prima facie showing of the nonexistence of any genuine issue of material fact.” (*Id.* at p. 845.) “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Id.* at p. 851.) “Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact.” (*Ibid.*, italics omitted.) Once the moving party has met its burden, the burden shifts to the opposing party to show the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subds. (a), (p)(2).)

We review de novo the record and the determination of the trial court. First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond. Second, we determine whether the moving party’s showing has established facts negating the opponent’s claims and justifying a judgment in the moving party’s favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable issue of fact. (*Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281, 290.)

Because we review the trial court’s decision de novo, we do not address Freeman’s complaints that the court’s order improperly “reads as if a trial had been conducted and evidence had been weighed by the trial court” because “[t]he only admissible facts for purposes of ruling on the Motion are those set forth in KHL’s statement of undisputed facts.” We are not bound by the reasons given by the trial court in its summary judgment ruling; we review the ruling of the trial court, not its rationale. (*Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1092 (*Howell*).)

II. Summary Adjudication of the First Two Causes of Action Is Proper

A. *First and Second Causes of Action: Breach of Contract and Promissory Note*

The trial court found that KHL met its initial burden of presenting admissible evidence supporting each element of its breach of contract and breach of promissory note claims. We concur with that finding. Indeed, Freeman admits in his opposition to the motion that (1) he executed and entered into the agreement dated June 18, 2008, disputing only whether in doing so he admitted a breach of prior agreements with KHL; (2) he executed the note dated June 19, 2008; (3) he did not pay on the note when it became due on May 20, 2009; and (4) the full amount on the note plus interest, late charges, and attorney fees remain unpaid by Freeman. Thus, putting aside any affirmative defenses (discussed below), KHL was entitled to summary judgment on its breach of contract and breach of promissory note claims. (See *Coyne v. Krempels* (1950) 36 Cal.2d 257, 261-262 [plaintiff entitled to summary judgment where he established by competent evidence the existence of contract, defendant's breach, and damages, and defendant did not controvert such facts]; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 383 (*FPI Development*); *Howell, supra*, 129 Cal.App.4th at p. 1092.)

Freeman contends summary judgment or adjudication of the breach of contract and breach of promissory note causes of action should not have been granted because he “alleged a valid defense”: i.e., that the \$45,000 amount was previously “paid and/or KHL failed to deliver product, which had a value in excess of \$40,000.00.” In his declaration in opposition to the motion for summary judgment, Freeman states he does not owe \$45,000 “because KHL did not deliver a substantial amount of the product” worth more than \$45,000. On appeal, he argues “a reasonable inference could be drawn” that the \$45,000 claimed was not paid because it was not owed.

Freeman fails to show the existence of a triable issue of fact as to either cause of action. First, although Freeman refers in his response to KHL's statement of undisputed facts to a purported defense that the \$45,000 "amount had already been paid," but his declaration in support of that statement does not so state and there is no other evidence to support it.

Second, KHL's obligation to "deliver a substantial amount of the product referred to in . . . the . . . [a]greement," not mentioned anywhere in the agreement or note, represents an unstated condition of performance. (See *FPI Development, supra*, 231 Cal.App.3d at pp. 385-386.) Nothing in the language of the agreement—which purports to summarize all of the terms on which the parties agreed to move forward and identified the inventory—or the note suggests the parties contemplated KHL's delivery of inventory as a condition of Freeman's obligation to pay any of the amounts due, or that KHL's failure to deliver items from one category of inventory would entitle Freeman to an offset against amounts owed for another category of inventory. Freeman's conclusory statement that "[a]ny amount that I owed under the Promissory Note was also conditioned upon receipt" of the inventory is inadequate to establish the existence of the condition.

Finally, Freeman argues summary judgment or adjudication of these claims should have been denied because the damages are speculative. Of course, the amount of the unpaid principal, \$45,000, is a sum certain, and the interest and late fees provided for in the note can be calculated with certainty. So Freeman asserts only that the amount of attorney fees to enforce the note's obligation remains uncertain because some portion of the work for which attorney fees was claimed in the summary judgment motion represents payment for efforts to obtain a default judgment against Mollicoolz.

Freeman's argument is based on a mistaken interpretation of his obligations under the promissory note: he believes KHL cannot recover against him for any amounts it expended to recover against Mollicoolz. The promissory note does not support this

interpretation. Paragraph 11 of the promissory note states that “[i]n the event any legal equitable action is taken to enforce any of the provisions of this Note, Customer shall pay all reasonable attorneys fees and costs incurred” in such an action. Freeman, as an individual, and Mollicoolz are collectively defined by the terms of the note as the “Customer.” Defining Freeman and Mollicoolz collectively as the “Customer” responsible for payment of the note and any applicable late charge, interest, and attorney fees indicates the parties intended Freeman and Mollicoolz to be jointly liable for the debt evidenced by the note, including any interest and fees resulting from a default. Nothing in the note suggests Freeman cannot be held responsible for attorney fees attributable to collection efforts aimed at Mollicoolz, and Freeman cites no authority to the contrary.

In addition, KHL submitted its attorney billing statements to show the sum expended to recover on the promissory note. To the extent Freeman’s argument can be interpreted as challenging the amount of attorney fees awarded, we note that a trial court’s attorney fees award under a contract is reviewed for abuse of discretion. (*Children’s Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 777.) Freeman makes no attempt to show the court abused its discretion in awarding the entire amount of attorney fees claimed.

Because Freeman failed to establish that a triable issue of fact exists on either the first cause of action for breach of contract or the second cause of action for breach of promissory note, summary adjudication of those causes of action was proper.

B. Third Cause of Action: Account Stated

KHL’s third cause of action for an account stated relies upon Freeman’s promise to pay “\$45,000 under the terms of the Agreement and the Promissory Note.”

These allegations, and the undisputed facts offered to support them, do not constitute a claim for account stated. The law is established in California that a debt which is predicated upon the breach of the terms of an express contract cannot be the basis of an account stated. (*Rio Linda Poultry Farms v. Fredericksen* (1932)

121 Cal.App. 433, 435-436.) “It is not every debt which can form the basis of an account stated or an action thereon. It cannot become a substitute for an action of debt upon a specialty, such as a promissory note. In such a case no subsequent statement of the amount due thereon, although agreed to by the payer, can supersede the special promise so as to form the basis of an action as upon an account stated to recover the original debt. The written promise being higher evidence of the debt and the debtor being already bound thereby, there could be no necessity for a resort to a subsequent statement and promise to pay. Moreover, the debtor being already completely bound for a specified sum, there is no element of uncertainty to be settled, and no difficulty in ascertaining the balance upon conflicting claims, which could constitute a consideration for a new promise to pay, and therefore such promise would be a *nudum pactum*.” (*Ibid.*; see *Bennett v. Potter* (1919) 180 Cal. 736, 745; see also *Moore v. Bartholomae Corp.* (1945) 69 Cal.App.2d 474, 477-478 [where the action was instituted to recover damages arising from the breach of an express contract for the payment of money, “there was not any issue before the court relative to an account stated between the parties . . .”].)

KHL failed to meet its burden of showing its entitlement to summary adjudication on its third cause of action for account stated.

C. Fourth Cause of Action: Money Had and Received

KHL’s cause of action for money had and received incorporates by reference the allegations of Freeman’s agreement and promise to pay \$45,000 under the terms of the agreement and the promissory note. Based on the agreement and promissory note, KHL alleges Freeman “had and received monies in excess of \$45,000 from KHL,” no portion of which has been paid, and asserts as undisputed that Freeman signed the agreement and promissory note.

A common count for money had and received is available when the express contract on which it is based is void, voidable, or unenforceable, or where a plaintiff elects the remedy of restitution following a defendant’s breach or failure of consideration.

(See 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 561, pp. 688-689, and cases cited therein.) Proof of a loan of money will not support a count for money had and received: the common law, from which we derive our forms of pleading known as the “common counts,” knew a count for “money lent” as the appropriate form in which to state a cause of action for money loaned. (*Jones v. Re-Mine Oil Co.* (1941) 47 Cal.App.2d 832, 843.) As none of these circumstances that would support a claim for money had and received are borne out by the facts submitted by KHL in support of its motion for summary judgment/adjudication, KHL failed to meet its burden of showing there exists no triable issue of fact on its fourth cause of action for money had and received.

III. There was no Prejudice in the Erroneous Summary Adjudication of the Common Counts

“No judgment shall be set aside . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Const., art. VI, § 13.)

It has been said that the erroneous granting of a summary judgment motion “ ‘lies outside the curative provisions’ of the harmless error provision of the California Constitution because such an error denies a party of its right to a jury trial.” (*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 947-948, and cases cited therein; see *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35 [because summary judgment denies the right to a trial, it is a “drastic” remedy].) Despite this lofty statement, purely technical errors in granting summary judgment can be found harmless. (E.g., *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146 [failure to state reasons for granting motion as required by statute harmless]; *Hawkins, supra*, 144 Cal.App.4th at pp. 947-948.)

Although not “technical,” the trial court’s error in finding KHL entitled to summary judgment on the entire complaint—including its common count claims for account stated and money had and received—is nonetheless harmless here. KHL did demonstrate that no triable issues of fact exist on its breach of contract and breach of promissory note claims, a showing Freeman failed to undermine. Because summary adjudication on these two causes of action was proper, KHL was entitled to judgment in the amount awarded by the court: the principal due, plus interest, late fees, and attorney fees, as stated in the promissory note. That the trial court also erroneously concluded that KHL had proved it could be awarded the same amount on two alternative theories, mere redundancies under the facts here, did not result in a miscarriage of justice and was therefore harmless.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

NICHOLSON, J.

HULL, J.