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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARK GIBBONS,

Plaintiff and Appellant,

v.

MARINEMAX, INC., et. al.,

Defendants and Respondents.

D058665

(Super. Ct. No. 37-2009-00102761-
CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey B. Barton, Judge. Reversed.

Mark Gibbons appeals a judgment entered in favor of Fraser Yachts California, Inc. (Fraser), after the trial court sustained Fraser's demurrer to his first amended complaint without leave to amend. We reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In accordance with the principles governing our review of a ruling sustaining a demurrer, the following factual recitation is taken from the allegations of Gibbons's

first amended complaint. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

In 2005, Gibbons began working for MarineMax, Inc. (MarineMax), as a yacht sales associate under a written offer of employment (the Employment Offer). The Employment Offer stated that it "is not meant to constitute an employment contract or guarantee of compensation or employment" and that Gibbons was an at-will employee. The Employment Offer provided that Gibbons would receive a weekly salary "plus commission on [his] boat and yacht sales." Gibbons and a MarineMax representative signed the Employment Offer. Gibbons also signed a Confidentiality and Non-Solicitation Agreement (the Confidentiality Agreement) stating, in part, that it did not "constitute a contract of employment."

In May 2008, Eric Benson approached Gibbons for assistance in purchasing a large custom built yacht. Gibbons believed that MarineMax did not have the experience necessary to retain Benson as a client because it had no recent custom built projects; however, he knew that Fraser handled custom built yacht projects.

In August 2008, MarineMax, through Gibbons, entered into a Commission Sharing Agreement (the Commission Agreement) with Fraser. The Commission Agreement provided that MarineMax and Fraser agreed "to share equally the gross commissions paid for the sale of a yacht" to Benson. Gibbons alleged that the Commission Agreement between MarineMax and Fraser "indicates [that he] is a 'party involved'" in the Commission Agreement. On January 2, 2009, Gibbons left his employment with MarineMax. Nonetheless, Gibbons continued to work with Benson

on his yacht purchase until late February 2009. In April 2009, Benson signed a letter of intent to purchase a yacht from Heesen Yachts (Heesen).

In November 2009, Gibbons sued MarineMax and Fraser alleging, among other things, breach of the Commission Agreement. Fraser answered the complaint, specially denying or admitting each material allegation. Fraser admitted that it entered into the Commission Agreement with MarineMax and that Gibbons executed the contract on behalf of MarineMax, but denied that Gibbons was a "' party involved'" in the agreement.

The trial court later granted Gibbons's motion for leave to file a first amended complaint (FAC). The FAC eliminated the claim against Fraser for breach of the Commission Agreement, and included claims for unjust enrichment, quantum meruit, breach of implied-in-law and implied-in-fact contract, breach of implied covenant of good faith and fair dealing, and promissory estoppel. In general, Gibbons asserted that Fraser and MarineMax owed him a portion of the sales commission on Benson's yacht purchase.

Fraser moved for summary judgment or, alternatively, summary adjudication. It also generally demurred to the FAC. After hearing argument on the demurrer, the trial court took the matter under submission and later sustained it without leave to amend. Gibbons appealed from the court's order. The trial court later entered a final judgment in favor of Fraser. We denied Fraser's motion to dismiss the appeal for lack of jurisdiction.

DISCUSSION

I. *Request to Dismiss Appeal*

Fraser renews his request that we dismiss the appeal based on lack of subject matter jurisdiction. We deny the request. Although Gibbons prematurely appealed from the trial court's order sustaining the demurrer, the trial court later entered a final judgment that disposed of Gibbons's entire action against Fraser. Accordingly, we exercise our discretion to treat the notice of appeal as filed immediately after entry of judgment and decline to dismiss the appeal. (Cal. Rules of Court, rule 8.104(d)(2).)

Fraser also asserts we should dismiss the appeal because Gibbons failed to compile an adequate record and improperly formatted the appellant's appendix. Fraser correctly notes that the appellant's appendix is not arranged chronologically and does not contain both alphabetical and chronological indices. (Cal. Rules of Court, rules 8.124 (d)(1), 8.144(a)(1)(C) & (b)(1).) Also, it is arguable whether the appendix contains all the documents necessary for a proper review of the appeal as it does not contain the original complaint, Fraser's answer thereto, or the demurrer. (Cal. Rules of Court, rules 8.122(b)(3), 8.124 (b)(1)(B).)

Nonetheless, Fraser filed a respondent's appendix that included these documents. (*Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 363, fn. 7 [dismissal not warranted where respondent supplied adequate record on which court could consider the appellant's contentions].) Additionally, we have already denied Fraser's request for monetary sanctions based on the deficiencies in the appellant's

appendix. We deny Fraser's motion to dismiss the appeal as the shortcomings in the appellant's appendix are not sufficiently egregious to warrant dismissal.

II. *Demurrer*

A. Standard of Review

We review an order sustaining a demurrer without leave to amend de novo (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318), assuming the truth of all properly pleaded facts as well as facts inferred from the pleadings, and give the complaint a reasonable interpretation by reading it as a whole and its parts in context. (*Palacin v. Allstate Ins. Co.* (2004) 119 Cal.App.4th 855, 861.) However, we give no credit to allegations that merely set forth contentions or legal conclusions. (*Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 768-769.) A complaint will be construed "liberally . . . with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) If the complaint states any possible legal theory, the trial court's order sustaining the demurrer must be reversed. (*Palestini v. General Dynamics Corp.* (2002) 99 Cal.App.4th 80, 86.) Whether a plaintiff will be able to prove its allegations is not relevant. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.)

B. Analysis

1. Breach of Implied-in-Fact Contract

A contract is either express, meaning it is stated in words, or implied, meaning its existence and terms are manifested by the conduct of the parties. (Civ. Code, §§ 1619-1621.) An implied-in-fact contract is predicated on an actual agreement between the parties, albeit one expressed in conduct, not words. (*Silva v. Providence Hospital*

of Oakland (1939) 14 Cal.2d 762, 773.) To plead a cause of action for implied-in-fact contract, the plaintiff must plead "the facts from which the promise is implied." (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 247; e.g., *Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 Cal.App.4th 880, 889 [implied-in-fact distribution agreement based upon appellant's distribution of wine for wine producer for many years].) The existence of an implied-in-fact contract is determined by the acts and conduct of the parties in light of all of the surrounding circumstances and presents a question of fact. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 611; see CACI No. 305.)

Thus, for Gibbons to adequately allege a claim for breach of an implied-in-fact contract with Fraser, he must allege facts from which the trier of fact could infer the existence of an agreement that obligated Fraser to pay him a sales commission. Gibbons adequately alleged such facts.

Specifically, Gibbons alleged that in May 2008, Benson approached him to assist in the purchase of a large custom built yacht. Gibbons believed MarineMax did not have the experience necessary to retain Benson as a client, but that Fraser had such experience and that a customer willing to purchase a \$40 million yacht would be of great value to Fraser. Fraser, through Neal Esterly, promised to "' take care of '" Gibbons on Benson's transactions.

Gibbons acted as "a go-between" for Benson in terms of communicating with Fraser. Gibbons also performed services such as working with Fraser to arrange Benson's tour of a shipyard, meeting with Benson and various potential builders, and

flying with Benson and Esterly to Italy to tour a shipyard. On January 2, 2009, Gibbons left his employment with MarineMax. Nonetheless, Gibbons was Benson's main contact for the yacht purchase through mid-February 2009 and continued to work with Benson on his yacht purchase until late February 2009. The following month, Benson signed a letter of intent to purchase a yacht from Heesen.

Gibbons claims that Fraser needed his close relationship with Benson to gain Benson's trust and that after developing Benson's trust, Fraser tried to cut him out of the deal. Although Fraser's commission deal with Heesen is unknown, Gibbons alleged that Fraser obtained a total commission of \$1.4 million. Gibbons believed he would receive about 25 percent of the total commission on the deal and that such a commission was implied.

Fraser does not address how the allegations in the FAC fail to state a valid claim for breach of an implied-in-fact contract; rather, it alleges that this claim fails as a matter of law because: (1) implied promises contrary to an express contract are not actionable; (2) Gibbons cannot offer parol evidence that Fraser agreed to compensate him; and (3) any services Gibbons provided to it were incidental to his employment obligations to MarineMax. We address each argument in turn.

"[I]t is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 203.) "The reason for the rule is simply that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for

undertaking certain obligations, it would be inequitable to imply a different liability" (*Wal-Noon Corp. v. Hill* (1975) 45 Cal.App.3d 605, 613.) We fail to see how this legal principle applies to these facts as the Commission Agreement, Employment Offer and Confidentiality Agreement do not contain an express contractual term regarding the amount of any commission due to Gibbons.

Gibbons alleged that MarineMax and Fraser entered into the Commission Agreement. Although, Gibbons also alleged that the Commission Agreement "indicate[d] [that he was] a 'party involved'" in it, Gibbons does *not* allege that he is a party to the Commission Agreement or that any other express contract exists between him and Fraser. Simply put, the Commission Agreement is a document governing the rights and obligations of Fraser and MarineMax and has no impact on the existence of an implied contract between Gibbons and Fraser.

Fraser seems to imply that Gibbons's Employment Offer with MarineMax and the Confidentiality Agreement are express fully integrated contracts that prevent Gibbons from obtaining a commission for his services from Fraser. An integrated agreement is a writing containing the final expression of the parties' intent. (*Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1434 (*Alling*).) Whether a writing was intended to be an integrated agreement is a question of law for the court. (*Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 805.)

As a preliminary matter, the face of these documents rebuts Fraser's assertion as they both state they are not employment contracts. Gibbons's description of the Employment Offer in the FAC as a "letter of employment and agreement" is

insufficient to transform it into a fully integrated contract purporting to govern all aspects of his employment relationship with MarineMax. Moreover, nothing in the writings between MarineMax and Gibbons prevents Gibbons from obtaining compensation from Fraser. For these reasons, Fraser's reliance on *California Medical Assn. v. Aetna U.S. Healthcare of California, Inc.* (2001) 94 Cal.App.4th 151 is misplaced.

We are similarly befuddled by Fraser's argument that evidence supporting the existence of an implied-in-fact contract between it and Gibbons is barred by the parol evidence rule. The parol evidence rule prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument. (Code Civ. Proc., § 1856; *Alling, supra*, 5 Cal.App.4th at p. 1433.) The parol evidence rule does not bar evidence supporting the existence of an implied-in-fact contract between Fraser and Gibbons because there is no written agreement between these parties. Additionally, there is no integrated written instrument between Gibbons and MarineMax that prevents the existence of an implied-in-fact agreement between Fraser and Gibbons.

Fraser argues that Gibbons is barred from obtaining compensation from it because the services he provided were incidental to his employment obligations to MarineMax. One of the essential elements of a contract is consideration. (Civ. Code, § 1550.) Consideration is adequate if there is some benefit to the promisor or detriment to the promisee. (Civ. Code, § 1605; *Southern Cal. Enterprises v. Walter & Co.* (1947) 78 Cal.App.2d 750, 760.) "There is general support in the California case

law for the proposition that consideration cannot consist of the promise to perform a preexisting duty owed to a third person." (*California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 219.) Nonetheless, if the bargained-for performance includes something that is not within the requirements of the preexisting duty, the law of consideration is satisfied even though the agreed consideration consists almost wholly of a performance that is already required. (*Bailey v. Breetwor* (1962) 206 Cal.App.2d 287, 292.) Here, the requirement for consideration is satisfied because Gibbons alleged that he continued to provide services to Fraser *after* his employment with MarineMax ended. Accordingly, the trial court erred in sustaining the demurrer to Gibbons's claim against Fraser for breach of an implied-in-fact contract.

In a footnote in its respondent's brief, Fraser argued for the first time that Gibbons cannot recover under any legal theory because any agreement by Fraser to pay a commission to Gibbons would be illegal under the Yacht and Ship Brokers Act, Harbors and Navigation Code section 700 et seq. (the Act). At oral argument, Fraser asserted that all facts necessary to determine this legal issue are alleged in the operative complaint. We disagree.

Although Gibbons alleged that he acted as a licensed yacht and ship salesperson, he does not allege that MarineMax, Fraser, and his subsequent employer were licensed yacht and ship brokers. In any event, our brief review of this statutory scheme suggests the Act may not apply to the instant transaction. (See, Harb. & Nav. Code, §§ 701, subd. (a) & (b), 710, subd. (f).)

2. Quantum Meruit; Unjust Enrichment; Breach of Implied-in-Law Contract

"[A] cause of action for unjust enrichment is *not* based on, and does not otherwise arise out of, a written contract. Rather, unjust enrichment is a common law obligation implied by law based on the equities of a particular case and not on any contractual obligation. [Citation.] Whether termed unjust enrichment, quasi-contract, or quantum meruit, the equitable remedy of restitution when unjust enrichment has occurred 'is an *obligation* (not a true contract [citation]) created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money.' [Citation.] 'The so-called "contract implied in law" in reality is not a contract. [Citations.] "Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice." [Citation.] [Citation.] [¶] '[A]n individual may be required to make restitution if he is unjustly enriched at the expense of another. [Citation.] A person is enriched if he receives a benefit at another's expense. [Citation.] The term "benefit" "denotes any form of advantage." [Citation.] Thus, a benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss. Even when a person has received a benefit from another, he is required to make restitution "only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it." [Citation.]' (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 346-347.)

Although pled as separate causes of action, Gibbons's claims for quantum meruit, unjust enrichment and breach of implied-in-law contract simply seek restitution for the value of the services he provided Fraser. For ease of reference, we will refer to these separate claims as one claim for quantum meruit. To recover in quantum meruit, a party "must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made' [citations]." (*Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 458.) "[A] plaintiff must establish *both* that he or she was acting pursuant to either an *express or implied request* for such services from the defendant *and* that the services rendered were *intended to and did benefit* the defendant." (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 248.)

Gibbons sufficiently pled a claim for quantum meruit recovery by alleging that he acted as "a go-between" for Benson in terms of communicating with Fraser and performed services that ultimately benefited Fraser. Fraser acknowledged the value of the services that Gibbons provided by telling him, through Esterly, that it would "' take care of '" him on Benson's transaction. Accordingly, Gibbons believed his entitlement to a portion of the commission was implied. Although Fraser later obtained a large commission, it cut Gibbons out of the deal.

Fraser argues that any restitutionary theory of recovery fails as a matter of law because: (1) implied promises contrary to an express contract are not actionable; (2) Gibbons cannot offer parol evidence that Fraser agreed to compensate him; and (3) any services Gibbons provided to it were incidental to his employment obligations to

MarineMax. As addressed above, these arguments are meritless. (*Ante*, part B.1.)

Moreover, as to the latter argument, Fraser provided no authority for the unique proposition that adequate consideration is a necessary element for these non-contractual restitutionary theories of recovery.

3. Promissory Estoppel

"Promissory estoppel was developed to do rough justice when a party lacking contractual protection relied on another's promise to its detriment." (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 315.) "The elements of a promissory estoppel claim are '(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.'" (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901 (*US Ecology*)). Although equitable in nature, promissory estoppel is akin to a cause of action based on contract except that the consideration needed to form an enforceable contract is provided by detrimental reliance. (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692-693.) Thus, courts "have characterized promissory estoppel claims as being basically the same as contract actions, but only missing the consideration element" (*US Ecology, supra*, 129 Cal.App.4th at p. 903.)

"To be enforceable, a promise need only be "definite enough that a court can determine the scope of the duty[,] and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages." . . . It is only

where "'a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, [that] there is no contract.'" (Garcia v. World Savings, FSB (2010) 183 Cal.App.4th 1031, 1045, citation omitted.)

Fraser claims the trial court properly sustained the demurrer to this claim without leave to amend because Esterly's statement to take care of Gibbons on any transaction involving Benson is fatally ambiguous and is not sufficiently clear to determine the scope of Fraser's obligation or breach. We disagree.

Gibbons alleged that through Esterly, Fraser promised on several occasions to take care of him with respect to transactions involving Benson. Based on this promise, Gibbons believed that Fraser would pay him compensation directly if he were not able to obtain his commission from MarineMax. He continued working on Benson's transaction after he left MarineMax, and MarineMax failed to pay him any commission on Benson's purchase. Gibbons relied on Esterly's promise of payment by leaving MarineMax before Benson's sale closed.

Fraser's alleged promise to take care of Gibbons for his work on Benson's purchase is unambiguous because it is not subject to differing interpretations. Under the circumstances, the alleged promise could only mean that Fraser would pay Gibbons for the services he provided related to Benson's yacht purchase. The alleged promise is also sufficiently definite for the trial court to determine the scope of Fraser's duty (i.e., to pay Gibbons for his work on Benson's purchase). (See *Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 226 [written promise by lender to "work with"

borrower to reinstate and modify the loan sufficient to allege promissory estoppel]; *US Ecology, supra*, 129 Cal.App.4th at p. 903 [promise to use "best efforts" to acquire land sufficient to support promissory estoppel]; *Lloyd v. California Pictures Corp.* (1955) 136 Cal.App.2d 638, 644 [assurance to plaintiff that the terms of a contract would be "complied with" sufficient to allege promissory estoppel].) Accordingly, the trial court erred in sustaining the demurrer to the promissory estoppel claim without leave to amend.

4. Breach of Implied Covenant of Good Faith

Gibbons alleged he had an implied-in-fact contract with Fraser and that Fraser breached the implied covenant of good faith contained therein by distancing itself from him after he accepted a position at Fraser's competitor in January 2009, and that once Fraser distanced itself from him, he could not add value to Benson's transaction.

Fraser asserts that the claim for breach of the implied covenant of good faith and fair dealing fails as a matter of law because Gibbons has not alleged the existence of an express contract between him and Fraser, and such a covenant does not exist in an implied-in-fact contract. We disagree.

An implied-in-fact contract is a valid contract predicated on an actual agreement between the parties as expressed by the conduct of the parties. (Civ. Code, §§ 1619, 1621; *Silva v. Providence Hospital of Oakland, supra*, 14 Cal.2d at p. 773.) As our high court explained, "[t]he covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes." (*Foley v.*

Interactive Data Corp. (1988) 47 Cal.3d 654, 690.) "Without a contractual relationship, [a plaintiff] cannot state a cause of action for breach of the implied covenant." (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.) "In essence, the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153 (*Love*).)

Although *Love* and other cases state that the covenant of good faith is implied to supplement express contractual covenants, that does not mean the covenant of good faith exists only in an express contract and not an implied-in-fact contract. Rather, courts have recognized the existence of the implied covenant of good faith in implied-in-fact contracts, with the question being whether the plaintiff has alleged the breach of the implied covenant of good faith or merely re-alleged the breach of an implied-in-fact contract term. (E.g., *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 352; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393-1394 ["The covenant of good faith'" "is an implied-in-law term of [every] contract. Therefore, its breach will always result in a breach of the contract, although a breach of a consensual (i.e., an express or implied-in-fact) contract term will not necessarily constitute a breach of the covenant."].)

For pleading purposes, Gibbons has sufficiently alleged an implied-in-fact contract with Fraser and that Fraser breached the implied covenant of good faith

contained therein by distancing itself from Gibbons in January 2009, thereby preventing Gibbons from adding value to Benson's transaction. Whether Gibbons will be able to prove these allegations is not relevant on demurrer (*Alcorn v. Anbro Engineering, Inc., supra*, 2 Cal.3d at p. 496) and will depend on whether Gibbons can establish the existence of an implied-in-fact contract and some bad faith conduct by Fraser that unfairly interfered with his right to receive the benefits of the implied-in-fact contractual promise that Fraser pay him for his services on Benson's yacht purchase (CACI No. 325).

DISPOSITION

The judgment is reversed. Appellant is entitled to recover his costs on appeal.

McINTYRE, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.