

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MERTENS HEAVY EQUIPMENT
REPAIR,

Plaintiff and Respondent,

v.

MOUNTAINS BY THE SEA, INC.,

Defendant and Appellant.

E053378

(Super.Ct.No. CIVNS700060)

OPINION

APPEAL from the Superior Court of San Bernardino County. Margaret A. Powers, Judge. Affirmed.

Law Offices of James A. Rainbolt and James A. Rainbolt for Defendant and Appellant.

Lund Law Group and Patrick L. Lund for Plaintiff and Respondent.

On October 30, 2007, plaintiff and respondent Mertens Heavy Equipment Repair filed suit against defendant and appellant Mountains by the Sea, a Nevada corporation, asserting defendant's failure to pay for services deriving from an alleged oral contract between the two, under which plaintiff would provide rental and maintenance of heavy machinery equipment to defendant. On February 27, 2009, plaintiff filed its second amended complaint (SAC) alleging causes of actions for breach of contract, common counts, open book account, account stated, and quantum meruit or unjust enrichment. Defendant filed its answer on April 8, 2009; however, defendant's answer was later stricken when plaintiff alleged defendant had lost its corporate status and, therefore, had no right to appear in California courts.¹ The court entered a default judgment against defendant on October, 4, 2010, in the amount of \$121,126.75 as prayed for in plaintiff's SAC.

¹ The record reflects defendant's California corporate status had been forfeited by the Franchise Tax Board on June 1, 2009. Likewise, defendant's Nevada corporate status appears to have been revoked on August 19, 1999. In order to do business in California, a foreign corporation must be in good standing in the state in which it is incorporated. (Corp. Code, § 2105, subd. (b).) Plaintiff alleged below that it filed its motion to strike defendant's answer on June 25, 2010, on the basis that defendant had forfeited its corporate status; however that motion is not contained in the record and no indication of its filing is reflected in the register of actions. The register of actions does reflect that on July 12, 2010, the court ruled on plaintiff's pretrial motion to strike defendant's answer, but does not indicate the basis of that motion nor its disposition. Plaintiff contended below that on July 12, 2010, the court gave defendant two months to rectify its corporate status, but, again, that is not reflected in the record. At the hearing on October 4, 2010, on entry of defendant's default judgment, the court noted it had previously stricken defendant's answer, though nothing in the record or register of actions reflects when this occurred.

On January 10, 2011, defendant filed a motion for relief from judgment and request for new trial after its California corporate status had been reinstated. At a hearing on March 4, 2011, the court denied defendant's motion. On appeal, defendant contends the trial court abused its discretion in denying its motion for relief from judgment because it established excusable neglect in failing to pay its California corporate taxes. Defendant additionally maintains the court abused its discretion in denying its motion for new trial because (1) it committed an error of law in failing to find that plaintiff's causes of actions were time barred by the statute of limitations; (2) it awarded excessive damages because the court did not consider the account stated between the parties as a full and complete payment for all services rendered by plaintiff to defendant; (3) it awarded excessive compensation because it failed to credit defendant with the amount defendant paid pursuant to the account stated against the entire amount of the judgment awarded; (4) it awarded excessive damages in awarding prejudgment interest; and (5) it erroneously determined defendant's motion for new trial was time barred.² We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On October 30, 2007, plaintiff filed a complaint seeking \$121,126.75 in damages from defendant for services provided by plaintiff to defendant. Plaintiff alleged it was an

² Defendant also contends the court erred as a matter of law in granting the default judgment because it sustained defendant's demurrer to plaintiff's first amended complaint (FAC), which was virtually identical to the SAC, upon which it granted a default judgment. However, defendant has failed to provide this court with a reporter's transcript of the hearing on the demurrer to the FAC or a copy of the order sustaining the demurrer to the FAC. Thus, we do not have an adequate record to address this contention. Moreover, defendant fails to support his argument with any citation to authority.

Arizona corporation licensed to conduct business in California. Plaintiff alleged defendant was a Nevada corporation qualified to conduct business in California. Plaintiff alleged it agreed to provide defendant heavy machinery rental and maintenance in return for payment. An exhibit attached to the complaint appears to be plaintiff's summary of transactions between the parties purportedly prepared on June 29, 2007. The exhibit lists invoice numbers, dates, amounts, compounded interest, and total remaining balance computations for 15 separate transactions beginning on July 9, 2004, and ending on July 1, 2007, with a total remaining balance as of August 30, 2007, of \$121,126.75. Plaintiff alleged causes of action for breach of contract (first cause of action), common counts (second cause of action),³ open book account (third cause of action),⁴ account stated

³ “In the common law action of general assumpsit, it was customary to plead an indebtedness by using the ‘common counts.’ These were statements to the effect that the defendant was indebted to the plaintiff in a particular sum, for some such generalized, formal reason as . . . ‘work and labor done,’ ‘materials furnished,’ and the like.” (4 Witkin, Cal. Proc. (5th ed. 2008) Pleading, § 553, pp. 680-681.) Despite the conclusory and vague nature of such claims, its ubiquity and purported convenience were deemed sufficient to overcome any objections to its continued use. (*Id.* at pp. 681-682.)

⁴ An open book account “means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner.” (Code Civ. Proc., § 337a.)

(fourth cause of action),⁵ and quantum meruit and unjust enrichment (fifth cause of action).

On September 2, 2008, defendant demurred to the complaint. In response, plaintiff filed a FAC on October 29, 2008; on December 2, 2008, defendant filed a demurrer to the FAC. On December 12, 2008, plaintiff filed opposition to defendant's demurrer. On January 29, 2009, the court sustained defendant's demurrer to the FAC on all causes of action and gave plaintiff 30 days leave to amend.⁶

On February 27, 2009, plaintiff filed the operative, SAC containing the same causes of action enumerated in the original complaint. Plaintiff now alleged that on or about July 7, 2004, plaintiff "agreed to provide ongoing heavy machinery equipment rental and maintenance to [defendant] during the course of [defendant's] project" in Havasu Lake, California. Under its cause of action for open book account, plaintiff alleged it had provided numerous invoices demanding payment, but that defendant failed to pay them. Under the cause of action for account stated, plaintiff alleged "it was clearly implied, if not expressed, in the Agreement, that even without a per-project contract between [defendant] and [plaintiff], that [defendant] would pay the agreed upon rate for

⁵ "An account stated is an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing. [Citation.]" (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752.)

⁶ The FAC, demurrer, and opposition to demurrer are not contained in the record. Neither is the reporter's transcript of the hearing on the demurrer nor any order sustaining the demurrer. Thus, we have no way of knowing why the court sustained the demurrer. The notice of ruling on the demurrer, which is contained the record, does not rectify this deficiency.

heavy machinery equipment rental and maintenance services as had been customary between [plaintiff] and [defendant], the amounts of which are reflected in the Invoices.” Moreover, it asserted that “[p]ursuant to the implied contract[ual] obligation, [plaintiff] forwarded the Invoices to [defendant], but [defendant] has failed and refused to make such payments.”

On April 8, 2009, defendant filed its answer to plaintiff’s SAC, in which it asserted various affirmative defenses including the statute of limitations (7th affirmative defense), that an account stated had been “entered into an agreement as to [the] amounts due each party from the other, which agreement covers the claim asserted in plaintiff’s complaint” (12th affirmative defense), novation (13th affirmative defense),⁷ and modification of contract (15th affirmative defense). Defendant attached to its answer an “UNCONDITIONAL WAIVER AND RELEASE,” which reads “[t]he undersigned has been paid and has received a progress payment in the sum of \$26,023.26 for labor, services, equipment or material furnished to: [¶] Aerostar Leasing Corp.” It further reflects the undersigned “does hereby release pro tanto any mechanic’s lien, stop notice or bond right that” it has on a “Caterpillar D-8K SN 77V 9157 and all attachments including ripper and slopeboard.” Additionally, the “release covers a Final payment for labor, services, equipment or materials furnished to [defendant]” The release is dated November 11, 2004, and is signed by Patricia Mertens on behalf of plaintiff.

⁷ A “[n]ovation is the substitution of a new obligation for an existing one.” (Civ. Code, § 1530.) A novation may be made “[b]y the substitution of a new obligation between the same parties, with intent to extinguish the old obligation.” (Civ. Code, § 1531.)

As noted above, defendant's answer was apparently stricken sometime thereafter, but the record fails to reflect the date. On October 4, 2010, the court held a prove-up hearing on entering a default judgment against defendant.⁸ Patricia Mertens, plaintiff's part-owner, accounts receivable, and custodian of records, testified that plaintiff entered into a contract with defendant to engage in heavy equipment repair at a job site in California. Mertens was responsible for compiling and sending out billing statements for work conducted by plaintiff pursuant to its contract with defendant; this she did. Mertens submitted an exhibit packet of certified copies of the work orders, billing statements, invoices, and letters sent to defendant regarding performance of the contract(s). The court took the matter under submission so that it could review the exhibits more closely and indicated it would issue judgment by the end of the day.

Plaintiff's exhibits submitted October 4, 2010, consisted of a number of documents apparently reflecting business services offered by it to defendant: Eleven appear to be work orders, billing statements, and invoices prepared by plaintiff and addressed to defendant beginning on June 23, 2004, and ending on September 14, 2004. They contain descriptions of work performed, machine parts apparently repaired or replaced, and amounts owed for those services.⁹ There are seven addendum invoices

⁸ Defense counsel appeared at the hearing and noted defendant had lost its California corporate status due to tax issues and that its corporate status had not been reinstated as of that time. As noted *ante*, the court stated defendant's answer had previously been stricken, although the register of actions does not reflect such an action.

⁹ Defendant attached an additional invoice dated October 13, 2004, to its motion for relief from default, which was not contained in plaintiff's exhibits.

dated June 10, 2005, reflecting accumulated interest on the unpaid balances on the prior invoices. There are eight subsequent statements of unpaid balances dated from November 12, 2004, through November 14, 2007. Finally, there are 10 letters, one with an attached amended invoice and another with a list of amended invoices, beginning July 28, 2004, and ending November 18, 2007, requesting payment, settlement, or agreement regarding the past due amounts. The court entered default judgment against defendant on October 4, 2010, in the amount of \$121,126.75 with no prejudgment interest awarded.

On January 10, 2011, defendant filed a motion for relief from judgment and for new trial. The motion claimed the judgment was the result of excusable neglect. Defense counsel attached his own declaration asserting that at the time of the default prove-up defendant's "corporate status had been forfeited due to its inability to pay its taxes to the California Franchise Tax Board." Mark Bayley, defendant's CEO, attached his own declaration averring that an economic slowdown in the construction industry and personal financial problems rendered it impossible for him to pay defendant's taxes. As a result, defendant's California corporate status was revoked. Defendant simultaneously submitted an evidence packet containing a Certificate of Revivor certifying defendant was relieved of suspension or forfeiture and was now in good standing with the Franchise Tax Board as of October 29, 2010. Defendant also attached a Certificate of Status from the California Secretary of State certifying defendant was an active corporation in good standing as of November 5, 2010.

As pertains to its motion for new trial, defendant made a number of allegations that the judgment was effectively an error of law and that the court had awarded

excessive damages. Defendant contended the unconditional waiver and release dated November 11, 2004, exonerated any and all payment obligations it had to plaintiff. Defendant maintained it never agreed to any rate of interest on overdue obligations, let alone one which amounted to a 21.6 percent annual percentage rate; thus, to the extent the damages awarded included compounded interest based on that percentage, the award was excessive because it exceeded that permitted by law.¹⁰ Defendant argued the statute of limitations had expired on defendant's claim for breach of oral contract and that no evidence supported its conversion to an open book account or account stated. Defendant claimed the judgment itself reflects no prejudgment interest was awarded, but that the amount of the award actually included prejudgment interest. Finally, defendant reasoned that, to the extent the unconditional waiver and release dated November 11, 2004, did not wipe out the entirety of its obligations to plaintiff, it should have at least received credit for that payment and that the invoices submitted by plaintiff reflected no such credit.

On February 7, 2011, plaintiff filed opposition to defendant's motion. Plaintiff primarily responded that defendant had failed to establish excusable neglect in failing to pay its taxes resulting in its forfeiture of its right to appear in court. As to defendant's motion for new trial, plaintiff maintained it was late; judgment had been mailed on October 13, 2010; service was deemed completed on October 18, 2010, pursuant to Code of Civil Procedure section 1012. Defendant filed the motion for new trial on January 7, 2011, 81 days after service. Therefore, because a motion for new trial must be served

¹⁰ Civil Code section 3289, subdivision (b) provides the interest rate applied to debt on a contract is 10 percent unless otherwise specified in the contract.

within 15 days of mailed notice of entry of judgment, the motion was 66 days late.¹¹ (Code Civ. Proc., § 659.) Plaintiff ultimately concluded the amount the court awarded it was within the court’s power based upon the amount plaintiff had requested and the evidence it had provided. (Code Civ. Proc., § 585, subd. (b).)

On March 4, 2011, the court heard argument on defendant’s motion for relief from judgment and new trial. The court noted the judgment it entered was on all five causes of action. It determined the motion for new trial was untimely and, even if not untimely, defendant had failed to show excusable neglect. The court denied defendant’s motion.

DISCUSSION

A. DEFAULT JUDGMENT

Defendant essentially maintains that its showing its corporate status had been revoked due to its inability to pay its taxes was sufficient evidence of excusable neglect such that the court abused its discretion in denying relief from judgment. We disagree.

“Section 473, subdivision (b) provides in pertinent part that ‘[t]he court may, upon any terms as may be just, relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect,’ provided relief is sought ‘within a reasonable time’” (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 371, fn. omitted.)

¹¹ The court later took judicial notice that it had given notice of entry of judgment, but neglected to indicate on what date it did so. Neither the record nor the register of actions reflects that any notice of entry of judgment was ever mailed.

Where the mandatory relief provisions do not apply, a trial court's order denying relief is reviewed under the abuse of discretion standard. "[A] trial court order denying relief under section 473, subdivision (b) is "scrutinized more carefully than an order permitting trial on the merits.'" [Citation.] "Because the law favors disposing of cases on their merits, "any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations].'" [Citation.] But . . . , "[a] motion to vacate a default and set aside judgment (§ 473) "is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse . . . the exercise of that discretion will not be disturbed on appeal." [Citations.] Moreover, all presumptions will be made in favor of the correctness of the order, and the burden of showing abuse is on the appellant. [Citation.]' [Citations.]" (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200.)

Here, we cannot say the trial court abused its discretion in denying defendant's request for relief from judgment. Defendant's California corporate status had been forfeited by the Franchise Tax Board for failure to pay taxes on June 1, 2009. This was more than 16 months prior to the entry of judgment against defendant. Yet the record is devoid of any steps defendant took during those 16 months to have itself reinstated as a corporation in good standing in California. Defendant failed to explain how much in taxes it owed, if it attempted to make any efforts at obtaining a payment plan, or any communications it had whatsoever with the Franchise Tax Board regarding its status.

Even assuming defendant did not learn of the revocation of its corporate status until plaintiff informed it either on June 25, 2010, or on July 12, 2010, when the court

addressed plaintiff's motion to strike defendant's answer, defendant still had two to three months to rectify the situation. Yet defendant failed to make any showing of any efforts it made during that period to reinstate its corporate status, knowing full well it faced a possible entry of default judgment unless it ameliorated the situation, especially since its answer had already been stricken. This it did not do. Defense counsel appeared at the default judgment prove-up and acknowledged his client's corporate status remained revoked. Defense counsel's subsequent averment in his declaration that defendant's corporate status had been revoked because of "its inability to pay its taxes" is not evidenced by any supporting documentation.

Likewise, defendant's CEO's declaration that an economic slowdown in the construction industry and personal financial problems made it impossible to pay its taxes, is simply too vague and unsubstantiated to overcome the trial court's discretionary power to evaluate whether defendant's failures were due to excusable neglect. Indeed, defendant was apparently able to have its corporate status reinstated as early as October 29, 2010, less than a month after the default judgment was entered, or as late as November 5, 2010, slightly over a month later. There is simply no explanation in this record as to why defendant was unable to reinstate its corporate status in the 16 months leading up to the default judgment, but was able to do so within a month after the court entered judgment against it. Thus, the trial court acted within its discretion in finding no excusable neglect sufficient to justify vacating the default judgment.

B. NEW TRIAL

Defendant argues the trial court abused its discretion in denying its motion for new trial, because the judgment was against the law and the damages it awarded were excessive. We disagree.

“The authority of a trial court in this state to grant a new trial is established and circumscribed by statute. [Citation.] Section 657 sets out seven grounds for such a motion: (1) ‘Irregularity in the proceedings’; (2) ‘Misconduct of the jury’; (3) ‘Accident or surprise’; (4) ‘Newly discovered evidence’; (5) ‘Excessive or inadequate damages’; (6) ‘Insufficiency of the evidence’; and (7) ‘Error in law.’” (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633.) However, in default a defendant can attack the judgment by a motion for new trial, only on the limited grounds that the damages awarded were excessive or because the judgment is legally erroneous. (*Misic v. Segars* (1995) 37 Cal.App.4th 1149, 1154; *Don v. Cruz* (1982) 131 Cal.App.3d 695, 704.)

“[A] trial judge is accorded a wide discretion in ruling on a motion for new trial and . . . the exercise of this discretion is given great deference on appeal. [Citations.]” (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) “[I]t is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party [citation], including an order denying a new trial. In our review of such order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial. [Citations.]” (*Ibid.*)

1. *STATUTE OF LIMITATIONS*

Defendant contends the court committed an error of law in granting judgment to defendant, particularly on all causes of actions, because the statute of limitations had expired on the oral contract alleged in the first cause of action. Although the statute of limitations on the oral contract may have expired by the time plaintiff filed its action, we find sufficient evidence in the record that the contract had been converted to an open book account such that the statute of limitations on that cause of action had not expired.

Under the abuse of discretion standard, “we must uphold the trial court ‘ruling if it is correct on any basis, regardless of whether such basis was actually invoked.’

[Citation.]” (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.) The statute of limitations on an oral contract expires two years after its accrual. (Code Civ. Proc., § 339.) “A statute of limitations starts to run upon the accrual of a cause of action. [Citations.] A cause of action accrues ‘upon the occurrence of the last element essential to the cause of action.’ [Citation.] Put another way, a cause of action accrues when “‘the party owning it is entitled to bring and prosecute an action thereon.’” [Citation.] ‘Generally, the right to bring and prosecute an action arises immediately upon the commission of the wrong claimed, . . .’ [Citations.] With reference to Code of Civil Procedure section 339, subdivision [(1)], typically the cause of action will accrue and the limitations period will start running upon the negligent breach of the oral contract.” (*Seelenfreund v. Terminix of Northern Cal., Inc.* (1978) 84 Cal.App.3d 133, 137.)

Here, plaintiff’s last invoice for services provided and items rented is dated September 14, 2004. Defendant attached an additional invoice dated October 4, 2004, to

its motion for relief from default, which was not contained in plaintiff's exhibits. Thus, the latter invoice would appear to be the last documented performance of plaintiff of its obligations under the oral contract and the final trigger of defendant's duty to pay. Therefore, plaintiff's cause of action for breach of oral contract would appear, on this record, to have expired at the latest on October 3, 2006. Plaintiff did not file its complaint until October 30, 2007, over a year after the statute of limitations would appear to have expired.

Nonetheless, causes of action for open book account and account stated are subject to a four-year statute of limitations as opposed to the two-year statute of limitations applicable to oral contracts. (*Filmservices Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc.* (1989) 208 Cal.App.3d 1297, 1307; Code Civ. Proc., §§ 337, 339.)

Where the facts alleged in the complaint give rise to a reasonable inference that an oral contract was superseded by an open book account or account stated the court may treat it as such. (*Filmservices*, at p. 1307.)

“The term ‘book account’ means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards

of a permanent character, *or is kept in any other reasonably permanent form and manner.*” (Civ. Proc. § 337a, italics added.)

“An account stated is an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing. [Citation.] To be an account stated, ‘it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing.’ [Citation.] *The agreement necessary to establish an account stated need not be express and is frequently implied from the circumstances. When a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered.* [Citations.]” (*Maggio, Inc. v. Neal, supra*, 196 Cal.App.3d at pp. 752-753, italics added; *Zinn v. Fred R. Bright Co.* (1969) 271 Cal.App.2d 597, 600.)

“When the account is assented to, “‘it becomes a new contract’” [Citation.]” (*Truestone, Inc. v. Simi West Industrial Park II* (1984) 163 Cal.App.3d 715, 725; *Zinn v. Fred R. Bright Co., supra*, 271 Cal.App.2d at p. 604.) It is “[v]iewed as a new contract which ordinarily forecloses further dispute as to the items of which it is composed” (*Gleason v. Klamer* (1980) 103 Cal.App.3d 782, 787.) “The account stated may be attacked only by proof of ‘fraud, duress, mistake, or other grounds cognizable in equity for the avoidance of an instrument.’ [Citations.] The defendant ‘will not be heard to

answer when action is brought upon the account stated that the claim or demand was unjust, or invalid.’ [Citation.]” (*Ibid.*)

“Actions on accounts stated frequently arise from a series of transactions which also constitute an open book account. [Citations.] However, an account stated may be found in a variety of commercial situations. The acknowledgement of a debt consisting of a single item may form the basis of a stated account. [Citation.] The key element in every context is agreement on the final balance due. [Citation.]” (*Maggio, Inc. v. Neal, supra*, 196 Cal.App.3d at p. 753.)

Here, plaintiff’s exhibits submitted October 4, 2010, appear to be a detailed statement constituting the principal record of the business transactions between it and defendant, arising out of their oral contract; they reflect the debits against defendant for services plaintiff rendered to it. Furthermore, the invoices, statements, and letters appear to have been entered in the regular course of business as conducted by plaintiff and kept in a reasonably permanent form and manner. The 11 work orders, billing statements, and invoices prepared by plaintiff and addressed to defendant beginning on June 23, 2004, and ending on September 14, 2004, were uncontested. Defendant did not dispute receipt of those invoices; indeed, defendant admitted receiving an additional invoice dated October 4, 2004. The invoices contain descriptions of work performed, machine parts apparently repaired or replaced, and amounts owed for those services. These documents alone are sufficient to establish the conversion of the oral contract between the parties into an open book account.

The seven addendum invoices dated June 10, 2005, reflecting accumulated interest on the unpaid balances on the prior invoices; 10 statements of unpaid balances dated from November 12, 2004, through November 14, 2007; and 10 letters, beginning July 28, 2004, and ending November 18, 2007, requesting payment, settlement, or agreement regarding the past due amounts are likewise sufficient evidence of a conversion of the open book account into an account stated. Again, no evidence in the record discloses defendant ever disputed the amounts owed. These documents stated a final balance due, excluding accumulating interest while the balance went unpaid. Since defendant apparently made no reply to the numerous documents addressed to it over several years regarding the amount owed for services rendered, an implied account stated arose. Thus, the statute of limitations for at least two of plaintiff's five causes of actions (for open book account and account stated) was four years, not two. Therefore, since plaintiff filed the current action on October 30, 2007, and the last invoice was dated October 4, 2004, plaintiff filed the current action within the four-year statute of limitations.

2. *EXCESSIVE DAMAGES*

a) Total Settlement

Defendant contends the unconditional waiver and release attached to its answer to plaintiff's SAC (since stricken) was an effective account stated for all services rendered it by plaintiff. Therefore, the award of damages was excessive because the parties had already settled the matter in its entirety for the \$26,023.26 plaintiff admitted to having received in exchange for its services, equipment, and materials. We hold defendant failed to establish the waiver and release was a final settlement of all business conducted

between the parties such that the court's entry of judgment was an error of law or resulted in excessive damages.

The release reflects that plaintiff "has been paid and has received *a progress* payment in the sum of \$26,023.36 for labor, services, equipment or material furnished to: [¶] Aerostar Leasing Corp. [¶] and does hereby releases pro tanto any mechanic's lien, stop notice or bond right that the undersigned has on: [¶] Caterpillar D-8K SN 77V 9157 and all attachments including ripper & slopeboard." (Boldface omitted, italics added.) First, a progress report does not suggest a final payment. Second, the document reflects payment for services rendered by plaintiff to Aerostar Leasing Corp., not defendant. Third, plaintiff issued a statement the next day itemizing the invoices with amounts due for each, and a total outstanding balance of \$71,457.86. That statement is hardly consistent with a settlement for all services rendered reached the day before. Fourth, although the release states that it "covers a Final payment for labor, services, equipment or material furnished to [defendant]" it does not specify what services or dates are covered by the agreement. Thus, it could relate to services separate and apart from those detailed in plaintiff's invoices. Therefore, defendant failed to establish any error of law and, because it was in default, defendant cannot argue insufficiency of the evidence.

b) Credit for the \$26,023.26

Defendant contends that, to the extent the unconditional waiver and release may not be deemed a total settlement of all outstanding payments it owed to plaintiff, it should at least have received credit for the \$26,023.26 it paid to plaintiff. Thus, the judgment

awarded was excessive and should be reduced by at least that much. Defendant's argument fails for much the same reasons discussed above.

From the document itself, it is not entirely clear to whom the services were rendered, for which payment was made, i.e., to Aerostar Leasing Corp. or defendant. Thus, the document could represent settlement of a separate matter than those contained in the invoices sued upon by plaintiff. Indeed, the document lists a particular item of equipment, a "Caterpillar D-8K SN 77V 9157 and all attachments including ripper & slopeboard," which is not listed in any of the invoices submitted by plaintiff. This, despite the fact that several of plaintiff's invoices specifically list other items of equipment by name and serial number. Defendant failed to demonstrate any error of law in the court's exclusion of a credit for \$26,023.26 in the amount awarded.

c) Interest

Defendant contends the award of interest at the rate of 21.6 percent as calculated by plaintiff exceeds that permitted by law, and the court erred in including prejudgment interest in the amount of its award when its order specifically excluded such an award.

First, having found sufficient evidence that the oral contract between defendant and plaintiff had been transmuted into an open book account and account stated means that a new contract had been formed. (*Truestone, Inc. v. Simi West Industrial Park II*, *supra*, 163 Cal.App.3d at p. 725; *Zinn v. Fred R. Bright Co.*, *supra*, 271 Cal.App.2d at p. 604; *Gleason v. Klamer*, *supra*, 103 Cal.App.3d at p. 787.) One of the terms of that contract was the interest charged on unpaid balances. Thus, defendant's argument that the contract rate must be limited to that provided by statute fails. Second, "[t]he contract

“rate applies until the contract is superseded by a judgment.’ [Citations.]” (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 538.) Thus, the court had discretion to award prejudgment interest, interest accruing between the filing of plaintiff’s complaint and entry of judgment. However, this it did not do. Rather, it awarded only the interest accrued on the unpaid balances as of the time plaintiff filed its complaint. In other words, the court did not award prejudgment interest, but awarded only the amount requested by plaintiff upon its filing of its original complaint on October 30, 2007. Thus, the court did not award any interest for the entire period between October 30, 2007, and entry of judgment on October 4, 2010.

Most of defendant’s arguments herein are, in fact, complaints regarding the sufficiency of the evidence to sustain the judgment. Since defendant failed to obtain relief from default, any arguments regarding whether the judgment was supported by substantial evidence are unreachable by this court. (*Misic v. Segars, supra*, 37 Cal.App.4th at p. 1154; *Don v. Cruz, supra*, 131 Cal.App.3d at p. 704.) The court awarded defendant damages in the amount prayed for by plaintiff. Defendant has not demonstrated that any error of law was committed nor that the damages were excessive.¹²

¹² Defendant’s contention the court erroneously determined its motion for new trial was untimely appears correct from a review of the record, since nothing indicates notice of entry of judgment was mailed. Nevertheless, we affirm a judgment if it is correct on any basis. (*In re Estate of Kampen* (2011) 201 Cal.App.4th 971, 1000; accord *Ceja v. Department of Transp.* (2011) 201 Cal.App.4th 1475, 1483; *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, 944 [“[W]e look for any correct legal basis on which to sustain the judgment.”].) Therefore, whether the court erred in determining the motion was untimely is irrelevant.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RICHLI
Acting P. J.

KING
J.