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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CONNIE FLORES,

Plaintiff and Appellant,

v.

C. RUSSELL GEORGESON et al.,

Defendants and Respondents.

F061787

(Super. Ct. No. 08CECG03585)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Connie Flores, in pro. per., for Plaintiff and Appellant.

Campagne, Campagne & Lerner, Justin T. Campagne and Wiley R. Driskill for Defendants and Respondents.

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This is an appeal from summary judgment for respondents and defendants, C. Russell Georgeson, Richard A. Belardinelli, and Georgeson & Belardinelli, a partnership law firm. Appellant and plaintiff Connie Flores contends the trial court erred in its

application of Code of Civil Procedure section 437c, subdivision (b)(3),<sup>1</sup> erred in not issuing the same ruling on the motion for summary judgment as it issued on an earlier demurrer and on an earlier section 425.16 motion, and failed to adequately examine the evidence for inferences that, she contends, establish triable issues of material fact. We affirm the judgment.

### **FACTS AND PROCEDURAL HISTORY**

Appellant recovered judgment in federal court in 2004 against DDJ, Inc. and DDJ, LLC (the DDJ entities). Ever since, appellant has been trying to collect on that judgment against various persons and entities related to the DDJ entities.<sup>2</sup> This appeal involves three defendants<sup>3</sup> who were attorneys for the DDJ entities in unrelated litigation between the DDJ entities and individuals Norman Traner and Steven Taft.<sup>4</sup>

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<sup>1</sup> All further section references are to the Code of Civil Procedure unless otherwise indicated.

<sup>2</sup> Nothing would be gained in the present case from recounting appellant's past and continuing efforts, other than to note that this is appellant's third appeal from trial court rulings in favor of various defendants in her pending state court action. There were additional plaintiffs in the litigation below, including James E. Salven as bankruptcy trustee of the DDJ entities. Although only the present appellant has appealed from the judgment, both she and Salven opposed the summary judgment motion. We will refer to appellant as "plaintiff" and will refer to James E. Salven as "Salven" in those instances when it is necessary to discuss his actions in the trial court.

<sup>3</sup> We will refer to Georgeson, Belardinelli, and the law partnership, as "defendants;" the remaining defendants are not parties to the present appeal.

<sup>4</sup> The litigation related to personal guarantees Traner and Taft had made regarding a sale of property and assets by the DDJ entities. We will refer to this as "the Traner litigation."

Plaintiff's second amended complaint contained a "Second Cause of Action for Violation of the Uniform Fraudulent Transfer Act."<sup>5</sup> (Additional capitalization omitted.) The second cause of action alleges, in essence, that defendants settled the Traner litigation by releasing an obligation owed by Traner and Taft to the DDJ entities in return for release of claims by Traner and Taft (and related entities) against individual officers, directors, and agents of the DDJ entities. It alleges that defendants' actions in accomplishing this settlement constituted "fraud and deceit" contributing to the insolvency of the DDJ entities, "to the detriment of the then existing creditors of DDJ Entities," including plaintiff. Further, the second cause of action alleges that the DDJ entities did not receive "a reasonable equivalent value in exchange" for releasing Traner's and Taft's \$1.7 million obligation to the DDJ entities. The second cause of action alleges that defendants "knowingly and purposely accomplished the compromise and settlement agreement with the actual intent to hinder, delay or defraud creditors of DDJ Entities, principally to defraud" plaintiff, her husband, and the DDJ entities' bankruptcy estates.<sup>6</sup>

Defendants moved for summary judgment on the causes of action against them.<sup>7</sup> Defendants contended their only involvement with the DDJ entities was as attorneys in

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<sup>5</sup> The trial court determined "the only cause of action Ms. Flores has against the Georgeson Defendants is the second for violation of the Uniform Fraudulent Transfer Act ...." Plaintiff does not challenge that determination on appeal.

<sup>6</sup> We note (as plaintiff also alleges in the second amended complaint) that the bankruptcies were filed more than 15 months after the settlement with Traner and Taft. The jury verdict in plaintiff's favor was rendered two months before the settlement and the case was pending on posttrial motions at the time of that settlement.

<sup>7</sup> Certain items plaintiff designated for the record on appeal relating to that motion were omitted by the clerk from the record as filed. Plaintiff has sought to remedy this problem by filing a motion for judicial notice, attaching copies of the relevant documents. These copies contain many handwritten annotations and underlinings that, based on the content, were added by plaintiff and were not a part of the typewritten documents filed by defendants. The court, by order of October 17, 2011, deferred ruling on the motion for judicial notice pending consideration of the merits of the appeal. We now grant that

the Traner litigation. They contended, in essence, that interim rulings in that litigation were, on balance, unfavorable to the DDJ entities in the approximate amount of \$1.1 million. They asserted the entities, therefore, entered into a settlement agreement. They contended their only receipt of money from the DDJ entities was the payment of a reasonable hourly fee for legal services actually rendered. Accordingly, they contended, they were not involved in any fraudulent transfer of assets of the DDJ entities.

Plaintiff failed to file a separate statement of disputed and undisputed facts. (§ 437c, subd. (b)(3).) She did file a memorandum of points and authorities in opposition to the summary judgment motion. Plaintiff contended the summary judgment motion was precluded by res judicata and collateral estoppel because the court previously had overruled defendants' demurrer and had denied their section 425.16 ("anti-SLAPP") motion. (Both the demurrer and the anti-SLAPP motion had been directed at earlier versions of the complaint.) Plaintiff also sought to join in the opposition to the summary judgment motion filed by Salven. Salven's opposition contended that defendants had willfully concealed the facts concerning fraud perpetrated by the confidential settlement agreement in the Traner litigation (which we will call the settlement-as-fraud theory, as opposed to the theory based on receipt of attorney fees by defendants as a fraudulent transfer).<sup>8</sup> Salven requested the summary judgment motion be continued for six months to permit further discovery. Salven filed a separate statement of disputed and undisputed

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motion for judicial notice of the typewritten portions of exhibits 1 through 7 submitted with the motion for judicial notice filed on September 26, 2011. We deny judicial notice of all handwritten portions of those documents.

<sup>8</sup> In her reply brief, plaintiff expressly disclaims any reliance on the attorney fees theory of recovery in the second cause of action. The "only fraudulent transfer[] referenced in [the] second cause of action" is the release of the DDJ entities claim for \$1.7 million against Traner and Taft through the compromise and settlement of the Traner litigation.

facts, in which plaintiff also purported to join.<sup>9</sup> Salven’s separate statement of facts agrees that the arbitrators ruled that principals of the DDJ entities had “made misrepresentations and concealed facts for the purpose of inducing ... [the] purchase [of] the assets and ... liabilities of [the] DDJ Entities.” The separate statement does not include any facts concerning fraud by defendants or by any other party in the settlement of the Traner litigation.

The court granted summary judgment on the second cause of action as to both plaintiff and Salven. The court denied Salven’s request for continuance, finding that the record disclosed an ample opportunity for discovery of the information Salven sought. The court observed that the factual allegations relied on by Salven in his opposition to summary judgment on the second cause of action were contained only in the second amended complaint, and not in declarations or documentary evidence. The court ruled such reliance on the complaint “improper” in the context of summary judgment proceedings. The court concluded, as to Salven, that defendants “have shown they are entitled to judgment on this cause of action because the undisputed facts show that the DDJ entities received a reasonably equivalent value in exchange for the transfer or obligation.” The court then discussed the evidence concerning the basis for attorney fees charged to and collected from the DDJ entities by defendants, finding the fees reasonable. The court concluded that the same factors required it to grant summary judgment against plaintiff on the second cause of action. In addition, the court noted, plaintiff’s “[f]ailure to file an opposing separate statement is [a] further ground to grant [defendants’] motion”

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<sup>9</sup> A primary focus of both the summary judgment motion and the oppositions was the statute of limitations, which the court resolved in favor of Salven on the eighth, ninth and tenth causes of action, which did not involve plaintiff. We have omitted all discussion of this aspect of the pleadings because it is not relevant to the issues plaintiff presents on appeal.

against plaintiff. The court did not discuss the settlement-as-fraud theory of liability beyond concluding that the settlement was made for reasonably equivalent value.

### DISCUSSION

Although set forth in 10 separate points in her opening brief on appeal, plaintiff's position consists of three essential issues, none of which has merit. First, plaintiff contends the court erred in exercising its discretion to grant summary judgment pursuant to section 437c, subdivision (b)(3) based on her failure to file a separate statement.<sup>10</sup> Second, plaintiff renews her contention that the trial court's earlier rulings on the demurrer and the section 425.16 motion preclude the grant of summary judgment because those earlier rulings constituted a determination that plaintiff's cause of action was "meritorious." Third, plaintiff contends, even if the court correctly refused plaintiff's joinder in Salven's separate statement of facts, defendants' evidence did not sufficiently establish that plaintiff was not entitled to recover on the settlement-as-fraud theory.

We need not resolve plaintiff's first contention, concerning joinder in a coparty's separate statement of facts. As we have noted, Salven's separate statement of facts contained no allegations to support the settlement-as-fraud theory of the second amended complaint, other than its acknowledgement of the arbitrators' rulings against the DDJ entities. (See *ante* at p. 5 & fn. 9.) Thus, as we will discuss below, even if we fully

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<sup>10</sup> Section 437c, subdivision (b)(3) requires that a party opposing a motion for summary judgment file "a separate statement that responds to each of the material facts contended by the moving party to be undisputed ... [and to] set forth plainly and concisely any other material facts that the opposing party contends are disputed.... Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the [summary judgment] motion." A party is not permitted to join in the separate statement of fact filed by another party. (*Fraze v. Seely* (2002) 95 Cal.App.4th 627, 636.) The trial court has discretion to determine the consequences of an attempt at such joinder pursuant to the summary judgment statute, as quoted above. (§ 437c, subd. (b)(3).)

consider the facts asserted in Salven's separate statement, plaintiff has failed to establish a triable issue of material fact sufficient to defeat defendants' summary judgment motion. Accordingly, the trial court's additional, alternative ruling under section 437c, subdivision (b)(3) would not, even if erroneous, constitute a basis for reversal. (See Cal. Const., art. VI, § 13.)

We also reject plaintiff's second contention that the trial court's ruling on the demurrer and the section 425.16 motion precluded granting of defendants' motion for summary judgment. The trial court must assume for purposes of a demurrer that the facts are as pled in the complaint. (See *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 505, fn. 1.) By contrast, the entire purpose of the summary judgment process "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Here, plaintiff may have adequately pled a cause of action for fraud or fraudulent transfer, and the demurrer was resolved on that basis. On summary judgment, however, the parties bear the burden of producing sufficient admissible evidence and declarations upon personal knowledge to satisfy the burden of proof assigned by statute to the moving and the opposing party. (See § 437c, subs. (c), (d); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 855.) Accordingly, the ruling on a demurrer does not preclude a different ruling when the court considers the evidence before it on a summary judgment motion.

On a section 425.16 motion, unlike a demurrer, the court is permitted to examine evidence produced by the parties. That examination of the evidence is for a very narrow purpose, wholly different from the purpose for examining the evidence in a summary judgment proceeding. On a section 425.16 motion, the court must determine whether, regardless of the merits of the plaintiff's claim, the cause of action arises from protected activity as described in section 425.16, subdivision (b)(1). If the court determines that the defendant has met that burden, the court must examine the substantive merits of the

case, but only for the limited purpose of determining whether “the plaintiff has established a probability that he or she will prevail on the claim.” (*Id.* at subd. (b)(3).) The court’s factual determinations at the second probability-of-success phase of the section 425.16 hearing can, in some circumstances, preclude a defendant from relitigating those same facts on the same evidence in a summary judgment motion. (See *Bergman v. Drum* (2005) 129 Cal.App.4th 11, 20-21.) In the present case, however, the court did not reach the second phase of the section 425.16 inquiry, in which it evaluated the merits of plaintiff’s case. Instead, the court denied the section 425.16 motion on the basis that defendants had not demonstrated that plaintiff’s action arose primarily from defendants’ exercise of protected rights of petition or free speech. (§ 425.16, subd. (b)(1).) Accordingly, denial of the section 425.16 motion did not result from findings of fact that precluded defendants’ later summary judgment motion.

Finally, we consider the plaintiff’s third contention: whether defendants’ evidence, and the inferences from that evidence, met defendants’ burden for summary judgment under plaintiff’s theory that compromise and settlement of the Traner litigation constituted fraud. Plaintiff contends that we must consider all inferences arising from the evidence before the court and reverse the summary judgment if there are inferences that raise a triable issue of material fact. She cites cases such as *Bryant v. Bakshandeh* (1991) 226 Cal.App.3d 1241 and *Maxwell v. Colburn* (1980) 105 Cal.App.3d 180 in support of this requirement.

We review such issues de novo. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 67-68.) Here, the evidence in the record establishes that defendants, in the course of “hard fought” litigation negotiated a settlement of the litigation by their clients who had been preliminarily awarded approximately \$1.1 million in damages. Other preliminary rulings in the arbitration had resulted in findings that principals of the DDJ entities had engaged in misrepresentation and concealment that resulted in a potential liability of \$2.3 million for them and for the DDJ entities. Even Salven’s separate

statement of facts concedes that there were significant interim findings against the DDJ entities even though (Salven asserts without any proof) the settlement itself was fraudulent. We have thoroughly reviewed the evidence in accordance with plaintiff's request that we focus upon any inferences that the settlement of the Traner litigation was fraudulent or was not based upon a good faith evaluation of the litigation by the relevant parties. We conclude that the evidence does not support any such inferences. On this state of the evidence, it is not possible that plaintiff could establish by a preponderance of the evidence, as she must to avoid summary judgment, that the settlement was in bad faith or fraudulent. (See *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 855, 856-857.) As a result, summary judgment for defendants was properly granted.<sup>11</sup>

The evidence concerning the reasonableness of the settlement was so clear, and the absence of any countervailing evidence on the part of plaintiff or Salven was so stark, that the trial court apparently went beyond consideration of that theory of liability under the second cause of action and looked at the further possibility that the cause of action was premised on a theory of direct receipt by defendants of payments. Accordingly, the court reviewed the evidence concerning the payment of attorney fees to defendants for their representation of the DDJ entities and the related litigants in the Traner litigation. The court concluded that the DDJ entities received reasonably equivalent value—legal services in the Traner litigation—in return for the transfer of property—payment of legal fees to defendants. It concluded Salven and plaintiff, with a full opportunity to conduct discovery and obtain access to the records of the DDJ entities, were unable to provide any

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<sup>11</sup> Because we review the summary judgment de novo, the trial court's failure to "specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists" (§ 437c, subd. (g)) was not prejudicial.

evidence that the payment of legal fees to defendants constituted a fraudulent transfer prohibited by Civil Code section 3439.05.

Plaintiff contends on appeal that she never intended to rely on a construction of the second cause of action that focused on defendants' receipt of legal fees from the DDJ entities. Instead, she contends, she intended to assert the first theory we have described above, namely, that defendants acted in concert with the principals of the DDJ entities to fraudulently release the DDJ entities' viable legal claims in the Traner litigation, thereby fraudulently transferring such property to the Traner entities. Even though the trial court did not fully articulate its consideration of the settlement-as-fraud theory for the second cause of action, an appellate court, in reviewing the record de novo, must affirm the order granting summary judgment when the record does not establish any triable issue of material fact that would permit success at a trial on the merits by the party opposing summary judgment. (See § 437c, subd. (m)(2).) The only limitation upon that requirement is that the appellate court must permit the parties to file supplemental briefs on the issue, when the parties have not already discussed the issue in their appellate briefs. (*Ibid.*) Here, as we have stated, plaintiff's entire presentation on the merits of the second cause of action, both in her opening and reply briefs, focuses on the settlement-as-fraud theory; she specifically disclaims reliance on the attorney-fee theory. As a result, we have determined that a further opportunity for supplemental briefing under section 437c, subdivision (m)(2) is not required. We find the record does not establish a triable issue of material fact that would permit plaintiff to succeed at a trial on the merits.

#### **DISPOSITION**

The judgment is affirmed. We grant appellant's motion for judicial notice of the typewritten portions of the documents attached as exhibits 1 through 7 of her motion for judicial notice; we deny the motion for judicial notice insofar as the motion pertains to

any annotations or other markings on those exhibits. Respondents are awarded costs on appeal.

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DETJEN, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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GOMES, J.