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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WELLS FARGO BANK, NATIONAL
ASSOCIATION,

Plaintiff and Appellant,

v.

GARY FOX,

Defendant and Respondent.

G045902

(Super. Ct. No. 30-2011-00447599)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Reversed and remanded.

Office of the General Counsel, Wells Fargo & Company, and Anne M. Schauerman for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

* * *

Defendant Gary Fox failed to answer plaintiff Wells Fargo Bank's complaint in plaintiff's action to collect two delinquent business obligations from defendant. Nonetheless, the court denied plaintiff's request for a default judgment and entered judgment for defendant because plaintiff could not produce the original "instruments of indebtedness" (as opposed to copies).

We hold the court's denial was erroneous because: (1) defendant's failure to file an answer admitted the material allegations of plaintiff's complaint, including plaintiff's allegations that defendant entered into, borrowed money under, and failed to pay amounts owed under revolving credit arrangements with plaintiff;¹ and (2) plaintiff submitted admissible evidence of (a) the agreements establishing the credit arrangements and (b) the amount of defendant's unpaid debt. Either of these rationales provides a sufficient ground to enter judgment against defendant. The failure of defendant to produce the original "instrument of indebtedness" is not a ground upon which the court could justify denying plaintiff its default judgment. We therefore reverse the judgment and remand the matter to the trial court to enter default judgment in plaintiff's favor.

FACTS

On February 7, 2011, plaintiff filed a verified complaint against defendant for breach of contract, account stated, and money had and received. Plaintiff alleged it entered into two business credit arrangements with defendant: (1) in August 2000, at defendant's request, plaintiff converted defendant's previous line of credit into a business

¹ The credit arrangements — defendant's business line of credit and business credit card account with plaintiff — involved revolving credit disbursements with no fixed principal amount and no fixed installment payments. The record contains no mention of any negotiable promissory note, and plaintiff does not allege the making of any negotiable promissory note.

credit card account (the 2000 loan); and (2) in November 2003, plaintiff granted defendant a separate business line of credit (the 2003 loan).

As to the 2000 loan, plaintiff attached to its complaint (and incorporated by reference): (1) a copy of defendant's signed August 7, 2000 letter requesting that his previous line of credit be transferred to a regular Master Card account (the 2000 letter), and (2) plaintiff's form Business Card customer agreement (the 2000 agreement). Also as to the 2000 loan, plaintiff alleged: (1) defendant last made a payment on December 25, 2009; (2) defendant was in default and plaintiff had accelerated the balance due; and (3) defendant now owed the principal sum of \$47,757, plus interest at the annual rate of 25.99 percent from May 10, 2010.²

As to the 2003 loan, plaintiff attached to its complaint (and incorporated by reference): (1) a copy of defendant's signed application for the 2003 loan (the 2003 application), and (2) plaintiff's form Business Line customer agreement (the 2003 agreement). Also as to the 2003 loan, plaintiff alleged: (1) defendant last made a payment on December 29, 2009; (2) defendant was in default and plaintiff had accelerated the balance due; and (3) defendant now owed the principal sum of \$73,384, plus interest at the annual rate of 5.50 percent in excess of plaintiff's prime rate from June 7, 2010.

The complaint prayed for: (1) as to the 2000 loan, the principal sum of \$47,757, plus interest at a rate of 25.99 percent from May 10, 2010, unpaid fees, and late charges; (2) as to the 2003 loan, the principal sum of \$73,384, plus interest at a rate of 5.50 percent per annum in excess of plaintiff's prime rate from June 7, 2010, unpaid fees, and late charges; and (3) attorney fees, costs, and other fair relief.

On April 26, 2011, the complaint was personally served on defendant. On June 10, 2011, plaintiff requested entry of defendant's default. That same day, the court

² For ease of reference, all dollar figures are rounded to the nearest dollar.

clerk entered defendant's default. Plaintiff requested a court judgment under Code of Civil Procedure, section 585, subdivision (b), against defendant in the amount of \$145,876 (comprised of principal of \$121,141, interest of \$19,837, costs of \$1,136, and attorney fees of \$3,761).

In support of its request for entry of default judgment, plaintiff filed the declaration of Danielle LaBostrie, its loan adjuster and records custodian, who attached copies of the signed 2000 letter and the signed 2003 application and declared they were true and correct copies evidencing the respective agreements and signed by defendant. As to the 2000 loan, LaBostrie declared that: (1) as of June 8, 2011, defendant owed principal of \$47,757 and interest (at an annual rate of 25.99 percent) of \$13,398; and (2) page one of the 2000 agreement provided for the recovery of attorney fees incurred in enforcing the agreement. As to the 2003 loan, LaBostrie declared that: (1) as of June 8, 2011, defendant owed principal of \$73,384 and interest (at an annual rate of 5.5 percent above plaintiff's then prime rate) of \$6,439; and (2) page one of the 2003 agreement provided for the recovery of attorney fees incurred in enforcing the agreement. As to both the 2000 and 2003 loans, LaBostrie attached business records evidencing the applicable interest rate and balance and calculation of interest due. In a separate declaration, LaBostrie declared plaintiff was unable to locate the original 2000 letter and 2003 application because plaintiff received both documents from defendant by facsimile and never had the originals.

Plaintiff also filed the declaration of its attorney, Anne M. Schauerman, who declared, inter alia, that: (1) defendant was personally served with the summons and complaint; and (2) on May 11, 2011, defendant phoned her office, acknowledged being served with the summons and complaint, and stated "he wished to resolve the matter but did not have the funds to do so." Schauerman attached as exhibits the report of the investigator who personally served defendant and a copy of the notice and letter mailed to defendant with the summons and complaint. Schauerman also attached documents

supporting plaintiff's request for \$740 to cover the costs of effectuating service on defendant. Schauerman also requested attorney fees of \$3,761 (comprised of \$3,550 plus 1 percent of \$21,141) in accordance with rule 366 of the Local Rules of the Orange County Superior Court and the attorney fee provisions of the 2000 and 2003 agreements.³

On July 8, 2011, the court denied plaintiff's request for default judgment, stating it would "not enter judgment for a commercial lending institution which cannot produce the original instrument of indebtedness." The court scheduled a new default prove-up hearing so plaintiff could submit the original documents.

On July 29, 2011, plaintiff filed a supplemental statement in support of its request for default judgment, arguing it would be an abuse of discretion for the court to deny default judgment based on the facts in the case. Plaintiff also filed the declaration of its attorney, Schauerman, who declared, inter alia, that on May 11, 2011, defendant phoned her office and "stated that he had been served with the complaint and was not sure what to do. He said he wished to resolve his debt but was not certain what to do. He was referred directly to the collector." On June 6, Schauerman left defendant a phone message "that the bank had not received an answer to the complaint and therefore intended to request his default and default judgment." That same day, defendant phoned Schauerman and said "he had not understood he needed to file an answer. [Schauerman] recommended that he obtain an attorney. He indicated he did not see the need, as he knew he owed the money to the bank. [¶] On June 28 [defendant] again called [Schauerman's] office, indicating his desire to resolve the debt but claiming lack of funds. In fact, he indicated he would simply move to Australia."

³ The Superior Court of Orange County, Local Rules, rule 366 provides: "When a . . . contract provides for the recovery of . . . a reasonable attorney fee the following schedule will be applied to the amount of the default judgment exclusive of costs:" "100,000.01 or more, \$3,550.00 plus 1% of the excess over \$100,000.00."

Plaintiff also filed LaBostrie's supplemental declaration, in which she declared that defendant's 2000 letter request "was received by fax, thus the intake group in Phoenix never had an original." As to defendant's 2003 application, LaBostrie declared the document was received by fax from a Wells Fargo branch in Orange County. "The branch cannot maintain original documents with confidential customer information such as social security numbers and bank account numbers, thus the branch is obligated to shred or otherwise destroy the document to protect the customer. The intake group in Phoenix never has an original, it simply has its electronic image as its business record. No original exists." LaBostrie attached all the monthly billing statements for the account on the 2003 loan and declared that at no time did defendant "ever dispute any statement, or the balance due on the" 2003 loan. The last monthly billing statement on the 2003 loan, dated June 4, 2010, stated the amount due was \$73,384. She also attached all the available monthly billing statements for the account on the 2000 loan and declared that at no time did defendant "ever dispute any statement or balance due on the" 2000 loan. The last monthly billing statement on the 2000 loan, dated May 7, 2010, stated the amount due was \$47,757.

The court, after considering plaintiff's supplemental documents filed on July 29, 2011, ruled in defendant's favor because "plaintiff failed to provide the court with the original instrument of indebtedness."

DISCUSSION

Defendant's Default Admitted the Material Allegations of Plaintiff's Complaint, Including His Revolving Credit Contracts with Plaintiff

Citing *Tuolumne Redemption Company v. Patterson* (1861) 18 Cal. 415 and other cases, plaintiff argues it "has been the law in California for over a century that the

failure to adequately deny the allegations in a verified complaint may be construed as an admission of those allegations.”

Plaintiff is correct. “Every material allegation of the complaint . . . , not controverted by the answer, shall, for the purposes of the action, be taken as true.” (Code Civ. Proc., § 431.20, subd. (a).) For example, in *Ware v. Heller* (1944) 63 Cal.App.2d 817, 820, the defendants, by failing to deny, admitted the complaint’s allegations: (1) that the defendants executed a promissory note and a trust deed in plaintiff’s favor; (2) as to the payment due dates for principal and interest on the note; and (3) as to the payments made and delinquent payments. “[F]ailure to raise an issue by proper denial or affirmative allegation will operate as a binding admission, under the doctrine of ‘conclusiveness of pleadings.’” (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1050, pp. 491-492.) “The normal effects of the admission are, first, to relieve the plaintiff from the necessity of offering evidence to support the allegation and the court from the necessity of making a finding on the issue; and, second, to preclude the defendant from offering evidence to challenge it, and to make a finding against the admission erroneous.” (*Id.* at p. 492.)

This is true in a default situation. “Generally speaking, the party who makes default thereby confesses the material allegations of the complaint. [Citation.] It is also true that *where a cause of action is stated* in the complaint and evidence is introduced to establish a prima facie case the trial court may not disregard the same, but must hear the evidence offered by the plaintiff and must render judgment in his favor for such sum, not exceeding the amount stated in the complaint, or for such relief, not exceeding that demanded in the complaint, as appears from the evidence to be just.” (*Taliaferro v. Davis* (1963) 216 Cal.App.2d 398, 408-409.)

Recently, this court summarized “the basic guidelines for analyzing the legal effect of a default. ‘Substantively, “[t]he *judgment by default* is said to ‘confess’ the material facts alleged by the plaintiff, i.e., the defendant’s failure to answer has the

same effect as an express admission of *the matters well pleaded in the complaint.*” [Citations.] The ‘well-pleaded allegations’ of a complaint refer to ““all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.”” (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 281.) “Because the default *confesses* those properly pleaded facts, a plaintiff has no responsibility to provide the court with sufficient evidence to prove them — they are treated as true for purposes of obtaining a default judgment.” (*Ibid.*) But, “if the well-pleaded allegations of the complaint do not state any proper cause of action, the default judgment in the plaintiff’s favor cannot stand.” (*Id.* at p. 282.)

Here, plaintiff stated three proper causes of action on each loan (breach of contract, as well as the common counts of account stated, and money had and received). But the court essentially ruled that because plaintiff did not have possession of the original loan applications, plaintiff failed to prove its allegation that defendant agreed to the 2000 and 2003 loans. This ruling was erroneous because defendant’s default confessed these properly pleaded material facts.

Plaintiff Submitted Admissible Evidence Establishing the Loan Agreements and the Amounts Owed by Defendant

The court’s ruling was also erroneous because plaintiff submitted admissible evidence in support of each element of its causes of action. The best evidence rule was repealed effective January 1, 1999. (Stats. 1998, ch. 100, § 1, p. 471.) Now, unless there is a genuine dispute concerning the terms of the writing or unless the admission of secondary evidence would be unfair, the “Secondary Evidence Rule,” (Evid. Code, § 1521, subd. (d)), provides that “[t]he content of a writing may be proved by otherwise admissible secondary evidence” (*id.*, subd. (a)). “Otherwise admissible secondary evidence” includes business records in the form of a photostatic copy or reproduction. (*Ibid.*, § 1550, subd. (a)(2).)

As part of its application for a default judgment, plaintiff submitted properly authenticated copies of documents, maintained by it as business records, in support of its allegations that defendant entered into two loan agreements with plaintiff, that plaintiff advanced money to defendant pursuant to those agreements, that defendant failed to repay the loans when due, and that defendant owed a specified amount of resulting debt. Plaintiff also submitted admissible declarations supporting its allegations of the interest due under the terms of the loan agreements, the calculation of attorney fees under the court's default schedule, and the normal recoverable costs incurred in connection with the suit. Nothing more was required to establish plaintiff's right to recover on its count for breach of contract.

Failure to Produce Original "Instrument of Indebtedness" Did Not Justify Denying Plaintiff Its Default Judgment

The court's only stated rationale for denying plaintiff's default judgment was that "[t]he court [would] not enter judgment for a commercial lending institution which cannot produce the original instrument of indebtedness." We presume the court used the term "instrument" in its technical sense, as defined in division 3 of the California Uniform Commercial Code, section 3101 et seq., dealing with negotiable instruments. California Uniform Commercial Code, section 3104, subdivision (b) defines the term "[i]nstrument" as used therein to mean a "negotiable instrument." A "negotiable instrument" in turn is "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it" inter alia "[i]s payable to bearer or to order at the time it is issued or first comes into possession of a holder." (*Id.*, subd. (a)(1).) Plaintiff did not allege the existence of a negotiable instrument, nor did the promises contained in the credit applications it submitted contain words of negotiability. Defendant's promise on the 2000 loan stated: "Customer agrees to pay Bank [defined as Wells Fargo Bank, National Association],

when due, the total of all purchases and advances made on Customer's Account. Customer also promises to pay the total of any Finance Charges and Other Charges due on an Account, as stated in this Agreement, and all costs and expenses, including any attorney's fees incurred in enforcing this Agreement." Defendant's promise on the 2003 loan was made in nearly identical language. Neither promise contained the magic words of negotiability, i.e., the promise "to pay bearer or to order." Thus, these loans to defendant were not embodied in an "instrument of indebtedness," and, accordingly, there was no risk defendant could be held liable to a third-party holder in due course. (See Cal. U. Com. Code, § 3302, subd. (a)(2).)

The court may also have been concerned with California Rules of Court, rule 3.1806 (rule 3.1806), which states: "In all cases in which judgment is rendered upon a written obligation to pay money, the clerk must, at the time of entry of judgment, unless otherwise ordered, note over the clerk's official signature and across the face of the writing the fact of rendition of judgment with the date of the judgment and the title of the court and the case." First, although the rule uses the phrase "written obligation to pay money," not the more precise word "instrument," we note there have been only two published cases interpreting this rule, and both involved negotiable instruments. (See *Kahn v. Lasorda's Dugout, Inc.* (2003) 109 Cal.App.4th 1118; *Bill Benson Motors, Inc. v. Macmorris Sales Corp.* (1965) 238 Cal.App.2d Supp. 937.) And we note the title of the rule of court is: "Notation on written *instrument* of rendition of judgment," (rule 3.1806, italics added), not "notation on written *obligation* of rendition of judgment." While ordinarily we do not consider the title of rules to be authoritative, the title of rule 3.1806 reflects the clear purpose of the rule — to protect the makers of negotiable instruments from becoming twice liable for the same obligation through the creditor's post-judgment negotiation of the instrument to a third-party holder in due course. (See Cal. U. Com. Code, § 3305, subd. (b) [the "right of a holder in due course to enforce the obligation of a party to pay the instrument" is *not* subject to ordinary defenses available

to obligor under a simple contract].) The risk of double liability is not present when entering judgment on a non-negotiable obligation, because a subsequent holder takes the written obligation subject to any defense the maker would have against the original holder, including the defense of extinguishment of the obligation by entry of judgment. (Civ. Code, § 1459 [“A non-negotiable written contract for the payment of money . . . may be transferred by indorsement, in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee, *subject to all equities and defenses existing in favor of the maker at the time of the indorsement*” (italics added)].) “When a party recovers a judgment for breach of contract, entry of the judgment absolves the defendant of any further contractual obligations, and the judgment for damages replaces the defendant’s duty to perform the contract. [Citation.] Upon entry of judgment, all further contractual rights are extinguished, and the plaintiff’s rights are thereafter governed by the rights on the judgment, not by any rights which might have been held to have arisen from the contract.” (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1766, 1770.)

Thus, rule 3.1806 has little or no substantive purpose where the obligation sued upon is a simple contract, not a negotiable instrument. Moreover, the court in *Kahn v. Lasorda’s Dugout, Inc.*, *supra*, 109 Cal.App.4th 1118, commenting on the predecessor to rule 3.1806, observed: “On its face, rule [3.1806] does not purport to address the circumstances under which a party, in a default proceeding or trial, may use a copy in lieu of the original of a promissory note or other written obligation to pay. Rather, it appears to be directory only to the *clerk* of the court, by stating that the clerk must undertake certain obligations with respect to a category of judgments. Indeed, temporally, the rule speaks to postjudicial determination, and does not even appear to address the subject of admissibility of writings at hearing or trial. A contrary interpretation would appear to create a conflict between rule [3.1806] and various Evidence Code provisions that generally permit the use of secondary evidence (including copies) to prove the content of

a writing. [Citations.] If rule [3.1806] were irreconcilable with the Evidence Code, the former would have to yield for rules ‘promulgated by the Judicial Council may not conflict with governing statutes.’” (*Id.* at p. 1123, fn. omitted.) In short, a rule of court may not, by itself, deprive a party of a substantive right under the common and statutory law.

Accordingly, the court should have entered judgment for the relief demanded in the complaint, including attorney fees and costs. The court erred by failing to enter a default judgment in plaintiff’s favor.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court to enter default judgment for the relief demanded in the complaint, including attorney fees and costs. Because defendant, by his default, admitted all of plaintiff’s material allegations, it would not be in the interest of justice to require defendant to bear plaintiff’s costs on appeal incurred in correcting the trial court’s error. Accordingly, plaintiff shall bear its own costs on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.