

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 THREE

H.CO. COMPUTER PRODUCTS, INC.,

Plaintiff and Appellant,

v.

KAISER FEDERAL FINANCIAL  
GROUP,

Defendant and Respondent.

G047767

(Super. Ct. No. 30-2011-00468890)

O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County,  
Robert J. Moss, Judge. Judgment affirmed. Appeal from order dismissed.

Russo & Duckworth and J. Scott Russo for Plaintiff and Appellant.

Law Office of John David Pereira and John David Pereira for Defendant  
and Respondent.

\* \* \*

Plaintiff H.Co. Computer Products, Inc., doing business as ThinkCP Technologies, sued defendant Kaiser Federal Financial Group, doing business as Kaiser Federal Bank. The operative second amended complaint sought damages for breach of contract and several other causes of action based on defendant's failure to take delivery of and pay for computer network security equipment. After a nonjury trial, the superior court found plaintiff's claims were barred by the statute of limitations (Cal. U. Com. Code, § 2725, subd. (1); all further statutory references are to the California Uniform Commercial Code unless otherwise indicated) and entered judgment for defendant. The trial court also denied plaintiff's motion for a new trial.

Plaintiff appeals from both the judgment and order denying its new trial motion. An order denying a motion for new trial is not independently appealable, but may be reviewed on an appeal from the judgment. (*Markley v. Beagle* (1967) 66 Cal.2d 951, 955; see also *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.) Thus, we shall dismiss plaintiff's appeal from the order denying the motion for new trial. Finding no error in the trial court's rulings, we affirm the judgment. Consequently, we do not consider defendant's alternative claim the statute of frauds bars plaintiff's action.

## FACTS

Plaintiff is a 17-employee firm that manufactures and procures computer equipment. Defendant, a financial institution, had a business account with plaintiff.

Bryon Strachan works for plaintiff. He had a longtime personal and professional relationship with Bruce Lee. In 2006, Lee was the director of defendant's I.T. department. Strachan testified Lee's practice was to verbally order parts and equipment rather than submit written purchase orders. After Strachan informed Lee the merchandise had arrived, it would be picked up and paid for by defendant.

In early 2006, Lee informed Strachan there had been “an intrusion” in defendant’s network and asked Strachan to research possible solutions to the problem. Strachan recommended an intrusion detection and protection system developed by a company named Juniper Networks. The system included a piece of equipment known as an IDP, and other equipment referred to as SSG’s. Plaintiff’s vice-president for procurement explained the operation of this system by analogy, describing the IDP as a home’s alarm system and the SSG’s as the door locks.

In May, Lee verbally ordered an IDP plus related materials and service agreement through plaintiff. The total cost was \$68,000. Defendant took delivery of and paid for this merchandise.

Strachan testified that on September 1, Lee verbally ordered the purchase 20 SSG’s from Juniper. According to Strachan, Lee asked him to send an e-mail with the equipment prices, stating, “I need it for my records and to be spent for this year or next year, . . . and I am going to want it in October.” The same day, Strachan sent Lee an e-mail quoting a price of over \$249,000 for the SSG’s, related equipment, and service agreement. In part, the e-mail stated, “I wanted to clean up the quote . . . so you have everything you need when we order . . .” He testified the word “quote” appearing in this e-mail was synonymous with “order,” and that “[w]here it says, ‘when we order,’ meant when we, [plaintiff], order[] through Juniper . . . I wanted [Lee] to have everything he needed before I ordered in the next few days . . .”

Strachan ordered the SSG’s in mid-September. He claimed this equipment was specially made for defendant because the manufacturer installed upgraded memory and software. Plaintiff received the equipment October 3.

Upon receiving the SSG’s, Strachan informed Lee of their arrival. Strachan testified Lee responded, “Just keep them. Store them there, and when I need them. I’ll pick them up.” Thereafter, on a regular basis throughout the remainder of 2006, and in 2007, Strachan routinely asked Lee when he wanted the SSG’s delivered. Lee kept

delaying delivery, citing his duties in opening new offices and other matters. Lee also mentioned he needed to “get” defendant’s new chief financial officer “in tune with the project.” Defendant did not pay for the SSG’s.

In late January 2008, Strachan received a telephone call from Lee. Strachan testified Lee told him “I need to send you an e-mail” and asked Strachan to “accept it.” The e-mail Strachan received stated in part as follows: “[Y]ou apparently do not understand what I have been saying to you. ¶ . . . ¶ . . . Neither [defendant], . . . nor I authorized any Juniper SSG units from [plaintiff] or you. ¶ As I have told you countless times and e[-]mailed you many times, including on 9.1.2006 . . . . ¶ ‘Do Not Order This Yet For Me.’ and ‘I will not be ordering any more.’ Still today it remains the same, at this time and for the projected future we will not be installing any Juniper SSG units. If we decide to move forward with an installation of SSG units it would not be until the second half of 2009, at the earliest. As always, there is a potential for a change in direction. If that should occur we will pay the best market price available at the time the order is placed. ¶ I am weary of these continued conversations with you.”

Strachan testified he found the e-mail “strange” because “it just didn’t make any sense.” In a later telephone call, Lee told Strachan “[t]his [e-mail] is something I had to do,” but again promised he would be taking delivery of the SSG’s.

Shortly thereafter in an e-mail to Lee complaining about defendant’s failure to renew a software contract through plaintiff, Strachan noted, “[I]’m out over 200k in inventory [I] can[’]t move for [J]uniper.” In March 2008, Lee told Strachan to include two SSG units in a purchase order for some servers, add the price of the SSG’s to that of the servers, and list the SSG’s at no cost. Later, Lee told Strachan to “[h]ang in there” and that he would be taking delivery of the SSG’s piecemeal. Between March and September, Lee also allowed Strachan to sell four of the SSG’s to other customers as long as he agreed to “replenish the stock . . . .” Plaintiff sold the SSG’s at a loss.

Through August 2009, Lee continued to tell Strachan to ““Just hang in there”” and he would take delivery of the SSG’s by ““put[ting] them with other orders.”” Strachan then learned Lee was having health problems. Lee died in December 2009.

In mid-2010, Strachan sent an e-mail to Paul Madore, one of defendant’s network managers, requesting a meeting to discuss the SSG’s. On July 22, Madore responded in an e-mail that stated: “[T]he Juniper IDP device has not been used for a while now and will not be used in the future either. We will be outsourcing all firewall/router/IDP/IPS devices so that they can be managed by a third party. That’s a done deal. The Juniper device is not in the picture anymore . . . .” Strachan testified this was when he first learned defendant would not be taking delivery of the SSG’s.

In early November, Strachan sent an e-mail to Kay Hoveland, defendant’s chief executive officer, outlining the transactions with Lee concerning the SSG’s. He asked defendant to “perform the contract.” Two weeks later, Hoveland responded informing Strachan the SSG order would have required board approval, there was no record of the order’s approval, and cited “a record of e[-]mails addressed to you from . . . Lee specifically stating that you were not to . . . order any Juniper SSG units.” On December 22, after another series of e-mails, Hoveland informed Strachan she “cannot see a basis for further dialogue on this matter.”

Plaintiff filed its initial complaint on April 20, 2011.

After taking the case under submission, the trial court issued a minute order rendering judgment for defendant with an explanation of its decision. The court found Strachan was a credible witness and “that Lee orally ordered the SSG’s.” It further concluded that, while Lee lacked actual authority to purchase the SSG’s, “by allowing Lee to orally order goods from [plaintiff] and paying numerous invoices without question over a number of years . . . , [defendant] created ostensible authority for him to enter into such an agreement.” Further, since the parties were merchants, under the California

Uniform Commercial Code, the parties' agreement "memorialized in the written email of September 1, 2006" was "sufficient to satisfy the statute of frauds."

As for defendant's statute of limitations claim, the court concluded the four-year period in section 2725, subdivision (1), applied. It held that since "[t]he agreement between the parties did not reference when [defendant] would take delivery of the goods," it would imply "a reasonable period of time," and found "90 days from the date plaintiff had the goods in stock is more than reasonable." Thus, it found the breach of contract cause of action accrued in January 2007 and plaintiff's delay in filing suit until April 2011 "was fatal" to its entire case.

Plaintiff moved for a new trial. Challenging the trial court's accrual finding and citing the doctrines of equitable tolling and equitable estoppel, it argued the trial court's "decision [was] against 'law'" and constituted an "[e]rror in law" (Code Civ. Proc., § 657, subs. (6) & (7)). The court denied the motion. It cited the fact "[t]he inventory was sitting in [plaintiff's] warehouse degrading . . . of its usefulness because of time," plus the existence of "plenty of triggers to let [plaintiff] know that [it] was wronged," including the "strange e-mail that [Lee] had sent to [Strachan]."

## DISCUSSION

### *1. Standard of Review*

The first question presented is the proper standard of appellate review. Plaintiff argues de novo review is appropriate because the trial court found "Strachan's undisputed testimony was credible." Defendant disagrees, urging us to review the trial court's findings for substantial evidence.

The latter approach is appropriate in this case. The issues presented on appeal concern when plaintiff's causes of action accrued and whether the doctrine of estoppel tolled the running of the statute of limitations. "[W]hen . . . a cause of action

accrues is a question of fact.” (*Krusi v. S.J. Amoroso Construction Co.* (2000) 81 Cal.App.4th 995, 1006.) Thus, “[t]he trial court’s finding on the accrual of a cause of action for statute of limitations is upheld on appeal if supported by substantial evidence.” (*Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, 17.) The same is true for estoppel. “[W]hether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law.” (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43.)

Plaintiff’s reliance on the trial court’s finding Strachan was a credible witness and the lack of any contradictory evidence presented by defendant does not suffice to overcome these principles. Although “where there is no conflict in the evidence on an issue, the finding of the trial court . . . amounts to a conclusion of law and the finding is not binding on a reviewing court . . . [t]his rule necessarily means that there must be no conflicting inferences which the trial judge could have drawn from the evidence.” (*Export Leaf Tobacco Co. v. County of Los Angeles* (1949) 89 Cal.App.2d 909, 916.) Under “the rule of conflicting inferences,” even when “all the facts are *admitted* or uncontradicted, . . . if it appears that either one of two inferences may fairly and reasonably be deduced from those facts, there still remains in the case a *question of fact* to be determined by the [trier of fact] . . . .” (*McKinney v. Kull* (1981) 118 Cal.App.3d 951, 955.) “It is the province of the trial court to resolve conflicting inferences. The circumstances as well as direct evidence are to be considered by that court in drawing inferences from the evidence.” (*Export Leaf Tobacco Co. v. County of Los Angeles, supra*, 89 Cal.App.2d at p. 916.)

Thus, “[i]n so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment . . . .” (*McKinney v. Kull, supra*, 118 Cal.App.3d at p. 955.) Further, “[a] finding will not be disturbed on appeal if some substantial evidence or reasonable

inference lends support thereto.” (*Export Leaf Tobacco Co. v. County of Los Angeles*, *supra*, 89 Cal.App.2d at p. 916.)

Defendant also argues plaintiff’s failure to include in the appellate record a transcript of the closing arguments at trial and the hearing on plaintiff’s new trial motion renders this case a judgment roll appeal that requires this court to conclusively presume the evidence supports the judgment. It is doubtful this case constitutes a judgment roll appeal. The original appellate record contained a transcript of all the testimony along with the documentary evidence presented at trial. The evidence supporting plaintiff’s new trial motion consisted only of a declaration by trial counsel and a copy of the court’s minute order explaining the basis for its decision. But even assuming defendant’s procedural argument has merit, its contention is now moot because we have granted plaintiff’s motion to augment the record to include a transcript of closing argument and the hearing on the new trial motion.

Thus, we review the trial court’s decision to determine whether substantial evidence exists to support its findings.

## 2. *Statute of Limitations*

### a. *Accrual*

In ruling the statute of limitations barred this action, the trial court found the breach of contract count accrued in January 2007, 90 days after plaintiff informed defendant the SSG’s were available for delivery and plaintiff’s failure to file suit until April 2011 barred all of its causes of action. Plaintiff does not dispute that, if the trial court’s finding is upheld, it dooms the entire case. But it does challenge the trial court’s 90-day accrual finding. Plaintiff argues defendant did not breach the contract until July 2010 when Madore sent Strachan an e-mail stating defendant had chosen to outsource its intrusion detection and protection operations and did not need the SSG’s.

The evidence supports the trial court's finding. The court found the parties' contract was governed by the California Uniform Commercial Code. Section 2725 declares "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." (§ 2725, subd. (1).) The statute further defines accrual as "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." (§ 2725, subd. (2).)

The parties' contract did not specify when defendant would take delivery of the SSG's and pay for them. Under the California Uniform Commercial Code "[p]ayment is due at the time and place at which the buyer is to receive the goods" (§ 2310, subd. (a)) and "[t]he time for . . . delivery . . . if not . . . agreed upon shall be a reasonable time" (§ 2309, subd. (1)). A "reasonable time takes into consideration the . . . subject of the contract and the condition of the merchandise for the sale and delivery of which the contract is made." (*Houglan v. Roth Blum Packing Co.* (1929) 99 Cal.App. 631, 635.) "The question of what is a reasonable time depends in each case upon its own particular circumstances. It is primarily a question of fact for the determination of the trial court." (*C.A. Hooper & Co. v. Freeman, Smith & Camp Co.* (1934) 1 Cal.App.2d 122, 124.)

Citing what it describes as "[t]he undisputed and/or uncontroverted facts," plaintiff argues the evidence does not support the trial court's finding on accrual. This argument ignores other evidence and inferences that can be reasonably drawn from the evidence. The subject of the parties' sales contract was computer equipment. Plaintiff paid over \$130,000 for the SSG's and related equipment and service agreement and its trial counsel acknowledged during closing argument the SSG's were "big parts" that were "occupying a whole warehouse." The operative second amended complaint even alleged "[p]laintiff has . . . incurred damages for storing these goods in [its] warehouse for the benefit of [d]efendant . . ." Thus, the court could properly conclude that after 90 days it

became unreasonable for a small firm like plaintiff to bear the expense of acquiring the SSG's for defendant, plus the inconvenience of storing this equipment without payment.

Beyond costs and inconvenience, the subject matter of the contract also meant any delay in acquiring and installing the SSG's did not make sense. Strachan claimed the SSG's had been specially manufactured for defendant, and plaintiff's vice-president testified the IDP defendant had previously purchased would "not work effectively" without them. Lee's September 1, 2006, order for the SSG's could be construed as stating he wanted delivery of the equipment in October. Defendant argues that, "because of daily advances in technology," "computer equipment" constitutes "a time-sensitive product." As the trial judge noted during the new trial motion hearing, the "usefulness" of the equipment "degrade[d]" while it sat unused in plaintiff's warehouse.

The trial court recognized "[p]laintiff opted to be patient with its customer probably hoping to maintain [its] continued business." But that "did not mean [plaintiff] could sit on its rights . . . and then unilaterally claim the benefit of an extended limitations period." (*Tin Tin Corp. v. Pacific Rim Park, LLC* (2009) 170 Cal.App.4th 1220, 1234.) As noted, the accrual of a cause of action for the breach of a contract for the sale of goods can occur even if the plaintiff is unaware of the breach. (§ 2725, subd. (2).) Consequently, a determination of when plaintiff reasonably should have been placed on notice that defendant had repudiated the contract was not relevant or required. Even so, after Strachan told Lee that plaintiff had received the SSG's, Lee's response, contrary to his usual practice, to "[j]ust keep them" and "[s]tore them" until "I need them," should have put plaintiff on notice that there was a problem with the order.

*Miles v. Bank of America Etc. Assn.* (1936) 17 Cal.App.2d 389, a case relied on by plaintiff, does not mandate a different result. It merely held the trial court did not err in granting the plaintiff's motion for a new trial where, on "[t]he facts of the instant case," it found the cause of action did not accrue until his demand the defendant repurchase bonds previously sold to him was "unequivocally refused." (*Id.* at p. 397.)

*Miles*, as well as the other cases cited above, recognize the question of when a cause of action accrues is one of fact. Where, as here, the parties' contract did not specify a time for defendant's performance, the evidence supports the court's finding plaintiff's causes of action accrued 90 days after it informed defendant the SSG's were available.

*b. Estoppel*

Alternatively, plaintiff relies on the doctrines of promissory estoppel and equitable estoppel to reverse the judgment.

It is doubtful promissory estoppel applies in this context. "[T]he doctrine of promissory estoppel is used to provide a substitute for the consideration which ordinarily is required to create an enforceable promise" (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672), not as a means of extending the statute of limitations on a cause of action. The cases cited in plaintiff's appellate briefs for this argument solely concern the existence of an enforceable agreement.

Plaintiff argues "[e]ach time that [defendant] made . . . representations [that it would take delivery of the SSG's it] constituted a new promise, new consideration and, based on the doctrine of promissory estoppel, a new contract." This argument violates the doctrine of the theory of trial. "It is elementary law in the appellate procedure of this state that 'the theory upon which a case is tried in the court below must be adhered to on appeal.'" (*Phalanx Air Freight v. National Skyway Freight Corp.* (1951) 104 Cal.App.2d 771, 775 [where parties try action on theory a single contract existed providing for monthly renegotiation of rates, the defendant could not argue on appeal the parties had a series of monthly contracts].) Thus, "[a] party is not permitted to change his position and adopt a new and different theory on appeal," because it "would not only be unfair to the trial court, but manifestly unjust to the opposing party.'" (*North*

*Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29 [applying doctrine to attempt to avoid successful statute of limitations defense].)

Plaintiff's second amended complaint contained a cause of action for promissory estoppel, but alleged this count as an "exception to the statute of frauds" because it "detrimentally changed its position in reliance on *the contract*." (Italics added.) During closing argument, plaintiff's trial counsel cited Strachan's September 1 e-mail to Lee, as the parties' contract, arguing it "was a confirmation of the [SSG] order. This is what the parties agreed to. ¶ . . . ¶ The agreement was made. . . . *So this is the contract . . .*" (Italics added.) Later, counsel asserted "[a]s far as the statute of limitations is concerned, . . . we didn't learn about [defendant's] breach until Mr. Lee passed away. ¶ . . . ¶ . . . [U]nder [the] UCC[, the] statute of limitations is four years. This action was still filed within the time frame on that." As noted, in its new trial motion plaintiff relied on the doctrines of equitable tolling and equitable estoppel, but did not mention promissory estoppel. It is now too late for plaintiff to seek reversal of the judgment on a new theory.

Alternatively, plaintiff argues defendant is equitably stopped from asserting the statute of limitations defense. Contrary to defendant's argument, plaintiff's summation of the evidence is not so deficient as to constitute a waiver of this argument.

Nonetheless, we agree the evidence supports the trial court's rejection of plaintiff's promissory estoppel argument. Under this doctrine, "[a] defendant will be estopped to invoke the statute of limitations where there has been 'some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action.' [Citation.] It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.]" (*Shaffer v. Debbas*, *supra*, 17 Cal.App.4th at p. 43.)

Lee's repeated promises to take delivery of the SSG's explained part of plaintiff's delay in filing suit. But "[e]quitable estoppel . . . comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. . . ." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383.) Where, however, "there is still ample time to institute the action within the statutory period after the circumstances inducing delay have ceased to operate, the plaintiff who failed to do so cannot claim an estoppel." (*Lobrovich v. Georgison* (1956) 144 Cal.App.2d 567, 573-574; see also *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 716 [reliance on equitable estoppel precluded where "appellants still had two months . . . before" time "limit expired"].)

The trial judge recognized "there were plenty of triggers to let [plaintiff] know . . . [it] was wronged," but failed to "file suit." Here, plaintiff was placed on notice a problem existed with the SSG contract as soon as Strachan received Lee's "strange" January 2008 e-mail. Lee's subsequent use of a subterfuge to obtain two of the SSG's and that he planned to obtain the remainder piecemeal should have caused plaintiff to inquire whether defendant intended to perform the contract. Even Strachan acknowledged he realized in July 2010 that defendant did not intend to perform the contract after he received Madore's response to his request to discuss it. Finally, any hope defendant would take delivery of the SSG's and pay the balance owed on the contract dissipated once Strachan received Hoveland's last e-mail in December 2010. Thus, plaintiff could not rely on estoppel to support its delay in filing this action.

In its reply brief, plaintiff states defendant's "conduct . . . effectively tolled the statute of limitations from beginning to run until July . . . 2010 . . ." Also, during oral argument plaintiff's counsel referred to equitable tolling as a ground for reversing the judgment. This issue has been waived. With some exceptions not applicable here, an

appellate court will not consider an issue first raised in a reply brief (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764), particularly where the brief “makes no legal argument developing the point” (*Stevenson v. Baum* (1998) 65 Cal.App.4th 159, 167, fn. 8). The same is true where a party raises a new issue during oral argument. (*Ibid.*) In any event equitable tolling is inapplicable because the doctrine “is ‘designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff’s claims—has been satisfied’” (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 100), and thus it “applies “[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one”” (*id.* at p. 99; see also *Quarry v. Doe I* (2012) 53 Cal.4th 945, 975). That is not the case here.

#### DISPOSITION

The appeal by appellant H.Co. Computer Products, Inc. from the order denying its motion for new trial is dismissed. The judgment is affirmed. Respondent is entitled to recover its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.