NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MARK A. BUTTERS,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant and Respondent.

2d Civil No. B282479
(Super. Ct. No. 16CVP-0128)
(San Luis Obispo County)

Mark A. Butters appeals from an order granting summary judgment in favor of Wells Fargo Bank, N.A. (Wells Fargo). He contends the trial court erred when it so ruled. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Wells Fargo is a national bank with offices in all 50 states. Butters is its customer. He opened a deposit account at its branch in Paso Robles, California.

When he opened his account, Butters signed an account application on an electronic terminal. He was provided with a "Consumer New Account Kit" which included a 73-page

"Consumer Account Agreement" (the Agreement). The Agreement includes a "legal process clause" which reads as follows: "[Wells Fargo] may accept and act on any legal process that it believes is valid, whether served in person, by mail, or by electronic notification, at any location of [Wells Fargo]. 'Legal process' includes a levy, garnishment or attachment, tax levy or withholding order, injunction, restraining order, subpoena, search warrant, government agency request for information, forfeiture, seizure, or other legal process relating to your account."

After opening his bank account in Paso Robles, Butters borrowed $100,000 from a lender in Maryland. He defaulted on the loan, and the lender obtained a judgment against him in Maryland. The lender also obtained a writ of garnishment and served the writ by mail on Wells Fargo's registered agent for service of process in Maryland.

Wells Fargo froze funds in Butters's deposit account in an amount sufficient to satisfy the garnishment. Wells Fargo was served almost one year later with a Maryland court order requiring it to turn the funds over to the judgment creditor. It did so.

Butters sued Wells Fargo for breach of contract, conversion, and declaratory relief.[1] The parties filed cross-motions for summary judgment. The trial court denied Butters's

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[1] In his opening and reply briefs, Butters argues that the trial court erred in ruling against him on his contract and conversion causes of action. He does not address the declaratory relief cause of action. Neither do we.

motion and granted Wells Fargo's motion. Judgment was entered in favor of Wells Fargo.

DISCUSSION

Standard of Review

Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)[2] The defendant bears the initial burden of showing that the plaintiff cannot establish one or more elements of the cause of action, or that there is an affirmative defense to it. (§ 437c, subd. (*o*); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) If the defendant makes one of the required showings, the burden shifts to the plaintiff to establish a triable issue of material fact. (*Ibid*.)

Our review is de novo. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 84.) We liberally construe the opposing party's evidence and resolve all doubts in favor of the opposing party. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.) We consider all evidence in the moving and opposition papers, except that to which objections were properly sustained. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) We may affirm the judgment on any basis. We review the trial court's ruling, not its rationale. (*Salazar v. Southern Cal. Gas Co.* (1997) 54 Cal.App.4th 1370, 1376.)

Breach of Contract

Butters contends that the trial court erred when it ruled against him on his contract cause of action. He fails to

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[2] All further statutory references are to the Code of Civil Procedure.

identify the terms of any contract allegedly breached by Wells Fargo. This failure is fatal to his claim.

"To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff. [Citation.]" (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186.) "Implicit in the element of damage is that the defendant's breach *caused* the plaintiff's damage." (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352, original italics.) It is therefore essential to identify a contractual provision that was breached. Butters has made no attempt to do so.

In his complaint, Butters alleges Wells Fargo breached the terms of his "account contract" without specific references. He seeks attorney fees pursuant to unspecified "provisions in [the Agreement]."

In his motion filed in the trial court, Butters claims that Wells Fargo breached "the [Agreement]," again without reference to specific terms. In his reply brief filed in this appeal, he contends that the breach was of unspecified terms in the "account contract" but "not the [Agreement]."

The precise terms of the allegedly breached contract have always been, and remain, uncertain and undefined. For that reason alone, the trial court did not err in ruling that Wells Fargo made a prima facie showing that there are no triable issues of material fact supporting the contract cause of action. We also observe that Butters did not produce evidence showing the existence of a triable issue of material fact.

Conversion

Butters next contends that the trial court erred when it granted Wells Fargo's motion for summary judgment as to his cause of action for conversion. We disagree.

"""Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages."" [Citation.]" (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.)

Butters contends that Wells Fargo wrongfully froze and then turned over funds in his deposit account in response to the Maryland court order and writ of garnishment. He acknowledges the existence of the "legal process clause" which allowed Wells Fargo to "accept *and act on* any legal process that it believes is valid, whether served in person, by mail, or by electronic notification, at any location of [Wells Fargo]." (Italics added.) But he argues that the clause is unenforceable because it is unconscionable. He is incorrect.

The doctrine of unconscionability has both procedural and substantive elements. The prevailing view is that both elements must be present before a court will refuse to enforce a contract or clause under the doctrine. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910 (*Sanchez*).)

""The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as """overly harsh""" [citation], "'unduly oppressive'" [citation], "'so one-sided as to "shock the conscience"'" [citation], or "unfairly one-sided" [citation].' . . . [Citation.]" (*Sanchez*, *supra*, 61 Cal.4th at pp. 910-911.) As

clarified by our Supreme Court, these various formulations "all mean the same thing." (*Id*. at p. 911.) "Because unconscionability is a contract defense, the party asserting the defense bears the burden of proof." (*Ibid*.)

Here the trial court correctly ruled that the legal process clause is not substantively unconscionable because it does not "shock the conscience." Wells Fargo is a national bank operating in all 50 states. The potential disruption to bank operations which would arise from a requirement that counsel review and independently determine the validity of service in all cases prior to acting on court orders from all 50 states could result in substantial costs and corresponding fees. And where, as here, the Sister State Money Judgment Act prohibits enforcement of another state's judgment "until at least 30 days after the judgment creditor serves notice of entry of the judgment upon the judgment debtor, proof of which has been made in the manner provided by" California law, the operation of the legal process clause is not unduly oppressive. (§ 1710.45, subd. (a).)

Butters admits that he became aware of his funds being frozen by July 24, 2015; and that Wells Fargo advised his counsel by letter dated July 30, 2015, that it accepts "valid legal service from all 50 states and that [it] was 'obligated to comply' with the garnishment order." He concedes that "the money was [not] transferred to [the judgment creditor]" until 10 months later, on May 26, 2016. There is no evidence that Butters contested the Maryland judgment or levy during that period.

Butters argues that California law requires the judgment creditor to obtain a California judgment and writ of execution prior to levy against his bank account. But as the trial court noted, this argument is better suited against the judgment

creditor. No authority has been cited for the principle that an intermediary bank can willfully disregard a court order requiring the turnover of funds, or that it must choose between violating a court order or subjecting itself to liability for conversion. This contention alone demonstrates why the legal process clause is commercially reasonable.

Butters next contends that the trial court erred in granting Wells Fargo's motion because, he claims, Wells Fargo conceded that it converted his funds on deposit. In support, he cites Wells Fargo's response to his purported Undisputed Material Fact No. 42. But he concedes that responses to purported undisputed material facts do not constitute evidence or judicial admissions. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746.) And he fails to point out that Wells Fargo did dispute the contention that it converted his funds elsewhere in its opposition papers, and produced evidence to support its position. See purported Undisputed Material Facts Nos. 10, 20 and 40. "A party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable." (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.) "'Unless this is done the error is deemed to be waived.'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Under the circumstances present here, Butters has failed to show that Wells Fargo's acts in freezing the account and then subsequently turning over the funds pursuant to Maryland court orders was wrongful. The cause of action for conversion therefore fails.

The Requested Relief is Unavailable

In his opening and reply briefs, Butters requests that we "order that Wells Fargo return the funds seized from [his] account and require [the Maryland judgment creditor] to obtain a California judgment under the Sister State Money Judgment Act and follow California collection procedure." (Italics omitted.) We will not and cannot do so. We are limited to affirming or reversing the order appealed from. (§ 43.)

DISPOSITION

The judgment is affirmed. Wells Fargo shall recover its costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Roger T. Picquet, Judge

Superior Court County of San Luis Obispo

Law Offices of F. Glenn Nichols and F. Glenn Nichols, for Plaintiff and Appellant.

Barton, Klugman & Oetting, Thomas E. McCurnin and Terry L. Higham, for Defendant and Respondent.