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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BROWN WHITE & NEWHOUSE LLP, Plaintiff, Cross-defendant, and Respondent, v. GARY CRAIG WYKIDAL, Defendant, Cross-complainant, and Appellant.	B233922 (Los Angeles County Super. Ct. No. BC434605)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dunn, Judge. Affirmed.

Gary C. Wykidal, in pro. per., for Defendant, Cross-complainant, and Appellant.

Brown White & Newhouse, Kenneth P. White, and Sydney M. Mehringer for Plaintiff, Cross-defendant, and Respondent.

A law firm, plaintiff Brown White & Newhouse LLP (BWN), sued a former client, defendant Gary Craig Wykidal (Wykidal), for breach of written contract, account stated, and breach of oral contract. Wykidal, an attorney, filed a cross-complaint against BWN for legal malpractice, breach of fiduciary duty, breach of oral contract, fraud, negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, and unfair business practices in violation of Business and Professions Code section 17200.

BWN demurred to the first amended cross-complaint and moved for summary adjudication of the complaint's causes of action for breach of written contract and account stated. After the trial court sustained the demurer without leave to amend and granted the motion for summary adjudication, BWN dismissed its remaining claim for breach of oral contract. BWN recovered a judgment for $93,231.31 in damages plus interest and costs.

In this appeal from the judgment, Wykidal challenges the orders sustaining the demurrer and granting summary adjudication. We reject his contentions and affirm the judgment.

BACKGROUND

I. The Underlying Legal Malpractice Action

Wykidal is an attorney who specializes in corporate and securities law. In 2006, Wykidal's client, The Carolina Company, was sued for violation of federal securities laws by the Securities and Exchange Commission. In February 2007, Thomas A. Seaman, the federal receiver who was appointed to handle The Carolina Company's affairs, sued Wykidal in federal court for legal malpractice. (*Seaman v. Wykidal* (C.D. Cal. SA CV 07-192 AHS (MLGx)) (the underlying malpractice action).)

Wykidal moved to dismiss the underlying malpractice action. The federal court treated the motion as a request to compel arbitration pursuant to the arbitration clause in the Carolina Company's retainer agreement with Wykidal. The motion to compel was

granted and the underlying malpractice action was submitted to Judicial Arbitration and Mediation Services (JAMS) for arbitration in October 2007 (the underlying arbitration).

II. Wykidal Retained BWN to Represent Him in the Underlying Arbitration

Wykidal, who was acquainted with BWN's managing partner Thomas Brown, spoke with Brown about the underlying arbitration on several occasions in early and mid-2008. Brown urged Wykidal to retain an attorney, but Wykidal informed him that his "cash flow was tight and that he could not afford an attorney."

In early October 2008, Brown and his partner, George Newhouse, told Wykidal that it would cost "between $26,000 to $30,000" to represent him in the underlying arbitration. After further consideration, Brown emailed Wykidal a proposal to represent him in the underlying arbitration for either a flat fee of $50,000 or a discounted hourly (partner) fee of $325 per hour.[1]

Wykidal chose the discounted hourly fee option and signed the October 13, 2008 "written engagement agreement" (Agreement) that is the subject of this litigation. The Agreement included the following provisions: BWN's standard hourly rates were $400 to $600 for "Partners," $700 for "Of Counsel," $395 for "Special Counsel," $220 to $375 for "Associates," and $165 for "Paralegals." Newhouse (the partner primarily responsible for the matter) and Brown would discount their hourly fees to $325 per hour

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[1] The email stated in relevant part: "Here is a budget George and I prepared after talking to you. If you think we overestimated/underestimated any necessar[y] tasks or the length of time it would take to complete those tasks, let me know. The rate I quoted you for George Newhouse of $325 is about 30% lower than his usual rate of $450. The budget below anticipates approximately 180 hours of our time through completion of arbitration for a total of $58,500. We believe that number should be lower because some of the work can be undertaken by an experienced associate/paralegal. We think it will be closer to $50,000. We can do one of two things in terms of billing: (1) bill you hourly at the rate we described above with a 30% discount or (2) do the matter for you at a flat fee of $50,000. Both proposals do not include costs which you would be responsible for paying in add[i]tion to either the hourly rate or the flat fee. As to fee arrangements for either the flat fee proposal or hourly, we propose: (1) no retainer deposit; (2) you pay us $3,000 per month at 10% interest; [and] (3) any proceedings following post arbitration award issuance will be discussed at that time."

as a "professional courtesy." Although BWN ordinarily requires that the outstanding balance be paid in full each month, Wykidal would be allowed to pay a monthly installment of $3,000 per month, plus 10 percent interest for amounts due beyond 30 days.

The Agreement, which did not impose a cap on fees, stated that "[a]ny estimates we may provide from time to time and any fee deposits or advances against costs we may require are not a limitation on our fees and other charges." It also contained an integration clause: "This Agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of the agreement will be binding on the parties. This Agreement may be modified by subsequent agreement of the parties only in writing signed by all parties, or by an oral agreement only to the extent that the parties carry it out."

III. BWN Successfully Defended Wykidal in the Underlying Arbitration and Wykidal Made Monthly Installment Payments to BWN Through December 2009

Pursuant to the Agreement, BWN represented Wykidal in the underlying arbitration from October 2008 to September 2009. During the course of that representation, "BWN conducted extensive legal research," "interviewed several potential and actual witnesses," "prepared several witness examination outlines," "prepared for a four-day arbitration proceeding," "represented Wykidal at a four-day arbitration proceeding in February 2009," "prepared and filed two rounds of post-arbitration briefing," and "prepared and filed an application for attorneys' fees and costs."

After the evidentiary hearing in the underlying arbitration was completed but before the final award was issued, Wykidal wrote a February 10, 2009 letter of appreciation to Newhouse, Brown, and Sydney Mehringer, the BWN associate attorney who worked on the matter with Newhouse. In the letter, Wykidal stated that he "could not have had a better defense team," he appreciated the way the "entire firm" handled his

case, and he "vastly under estimated the amount of time and preparation that was needed in order to mount a well prepared defense."[2]

The arbitrator issued a final award in Wykidal's favor in May 2009.

From November 2008 through March 2010, Wykidal received monthly invoices from BWN for services rendered in the underlying arbitration. Pursuant to the Agreement, Wykidal paid the $3,000 monthly installments in December 2008, January 2009, February 2009, April 2009, May 2009, August 2009, and September 2009.

In August 2009, Wykidal sent Brown a letter concerning BWN's "billing and related issues." The letter mentioned that as a result of economic problems and an unexpectedly large bill from Marc Aleser for $50,000 (apparently for serving as the expert witness in the underlying arbitration), Wykidal was having difficulty paying BWN's legal fees. With regard to the total fees incurred in the underlying arbitration, Wykidal stated, "I had no idea that we had exceeded the $50,000 estimate. [¶] I don't know what we could have done to keep the cost down in a range of the original $50,000 estimate, but I would hope you can see why it seems unfair that it doubled the original estimate. [¶] As George [Newhouse] may have told you, I complained to him on two or three occasions at the inception of this matter when I realized that Sydney [Mehringer] was going to participate in this lawsuit at every single juncture. I immediately realized that despite the discounted billing rate, your effective hourly billing rate would be almost $600 an hour. That was not something that I had anticipated but I understand that's the way your firm apparently practices. I respect and understand that but again this was a concern and a frustration from the beginning."

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[2] The letter stated: "I don't believe I can completely put into words the appreciation that I have for George, Sydney and your entire firm in hailing [*sic*] the defense of my case. I vastly under estimated the amount of time and preparation that was needed in order to mount a well prepared defense. Your level of preparation could not have been exceeded. George's temperament during the hearing was superb. Regardless of the outcome of this case, I could not have had a better defense team working on my behalf. [¶] Thank you again so much."

After failing to pay BWN the October and November installments, Wykidal paid BWN $7,500 in December 2009. Wykidal made no further payments to BWN after December 2009. According to BWN's records, Wykidal's outstanding balance as of March 2010 was $93,231.31 plus interest.[3]

IV. The Pleadings in This Action

Based on its position that Wykidal breached his obligation under the Agreement to pay the outstanding balance of $93,231.31 plus interest, costs, and attorney fees, BWN filed the present action on April 9, 2010. BWN's complaint alleged claims for breach of written contract, account stated, and breach of oral contract. (As previously indicated, the breach of oral contract claim is no longer at issue.)

Based on his position that BWN committed fraud in the inducement and legal malpractice, Wykidal filed a cross-complaint on June 24, 2010. Wykidal's cross-complaint alleged claims for legal malpractice, breach of fiduciary duty, breach of oral contract, fraud, negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, and unfair business practices in violation of Business and Professions Code section 17200.

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[3] The four-day arbitration was conducted in February 2009. As reflected in BWN's invoices, the bulk of its fees were incurred in January (as reflected in the February 2009 invoice) and February 2009 (as reflected in the March 2009 invoice).

BWN's invoices reflected a balance due of $11,674.19 in November 2008; $15,496.19 in December 2008; $22,350.30 in January 2009; $60,997.58 in February 2009; $95,815.90 in March 2009; $95,014.28 in April 2009; $98,637.61 in May 2009; $97,215.45 in June 2009; $98,292.63 in July 2009; $97,271.70 in August 2009; $98,967.08 in September 2009; $97,085.08 in October 2009; $97,768.90 in November 2009; $92,090.30 in December 2009; $92,903.32 in January 2010; $92,903.32 in February 2010; and $93,231.31 in March 2010.

V. The Trial Court Sustained BWN's Demurrer to the First Amended Cross-complaint

BWN demurred to the first amended cross-complaint, the operative pleading.[4] In analyzing the demurrer, the trial court divided the allegations in two groups: (1) the malpractice-based allegations (legal malpractice and breach of fiduciary duty); and (2) the fraud-based allegations (breach of fiduciary duty, breach of oral contract, fraudulent misrepresentation, negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, and unfair business practices).

The trial court sustained, without leave to amend, the demurrer to the malpractice-based allegations on the ground that, because the underlying arbitration was conducted under the Federal Arbitration Act (FAA) and, therefore, the Federal Rules of Civil Procedure applied, BWN's failure to advise Wykidal to offer a proposed settlement under California Code of Civil Procedure section 998 (section 998) did not constitute malpractice as a matter of law.

The trial court sustained, without leave to amend, the demurrer to the fraud-based allegations, stating that "the parol evidence rule (Cal. Code Civ. Proc., § 1856, subd. (a)) prohibits the use of parol evidence of alleged prior agreements to contradict a written integrated[] agreement."

VI. The Trial Court Granted BWN's Motion for Summary Adjudication of Its Claims for Breach of Written Contract and Account Stated

BWN moved for summary adjudication of the complaint's causes of action for breach of written contract and account stated.

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[4] After BWN demurred to the original cross-complaint, Wykidal filed an amended cross-complaint. The trial judge, who was unaware that Wykidal had filed an amended cross-complaint, sustained the demurrer to the original cross-complaint with leave to amend. Although Wykidal's opening brief on appeal purports to challenge the order sustaining the demurrer to the original cross-complaint, we need not discuss the superseded pleading.

A. The Motion

BWN provided documentary evidence to support its claim that: (1) it entered into a written Agreement to represent Wykidal in the underlying arbitration; (2) it performed its duties under the Agreement; (3) Wykidal breached his obligation to pay the amounts owed under the Agreement; and (4) it incurred damages as a result of the breach. It argued that there were no triable issues regarding the above facts.

With regard to its claim for an account stated, BWN argued that there were no triable issues "regarding the material facts that (1) BWN and Wykidal established an account stated when BWN sent Wykidal monthly invoices for services rendered and (2) Wykidal did not object to BWN's invoices."

B. The Opposition

In opposition, Wykidal contended that summary adjudication of the breach of written contract claim should be denied because "[t]he reasonable value of legal services provided by an attorney is always a question of fact regardless of the parol evidence rule." He further claimed that he was entitled to an offset for the expert witness fees he could have recovered had he been advised to offer a proposed settlement under either federal or state rules of civil procedure.

C. The Reply

In reply, BWN disagreed that it was required to prove the reasonableness of its fees as an element of its claim for breach of contract. BWN contended that the case cited for that proposition, *Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1 (*Civic Western Corp.*), did not involve a breach of contract cause of action, but rather a prevailing party's claim for attorney fees under Civil Code section 1717. As to the merits of Wykidal's assertion that its fees were unreasonable, BWN argued there were no triable issues of material fact for the following reasons.

1. The initial $58,000 estimate did not create a triable issue of material fact. The initial estimate was based on the assumption that the arbitration would take three rather than four days. The initial estimate did not include a budget for postarbitration briefing or application for fees and costs. By his own admission, Wykidal conceded that he "didn't know what we could have done to keep the cost down to the original estimate."

2. Adding associate attorney Sydney Mehringer to the defense team did not create a triable issue of material fact. The Agreement plainly disclosed the hourly rate for BWN's associates. By his own admission, Wykidal, who is an attorney, conceded that he respects and understands that BWN, like most firms, uses associates.

3. Wykidal's claim that he did not know about or authorize the postarbitration briefing did not create a triable issue of material fact. Wykidal provided no expert declaration that such briefing was unreasonable or that his specific authorization was required.

4. Wykidal's assertions that the BWN attorneys held a substantial number of conferences, stayed in a hotel in Orange County, and ordered a meal during the four-day arbitration did not create a triable issue of material fact. Wykidal provided no expert witness declaration that these or any other charges were unreasonable.

D. The Trial Court's Ruling on the Contract Claim

The trial court found that BWN satisfied its initial burden of establishing the existence of a written contract, its performance of the contract, Wykidal's breach, and its resulting damages. As to Wykidal's contention that BWN's fees were unreasonable, the trial court found that: (1) this contention should have been but was not raised in the answer as an affirmative defense; (2) this contention, even if raised, was not supported by admissible evidence; and (3) in any event, this contention was not applicable to a claim for account stated.

The trial court granted BWN's motion for summary adjudication of the breach of written contract claim, stating: "It is undisputed that the parties entered into the

Engagement Agreement, which included express terms regarding the work [BWN] would perform and the rate at which [BWN] would be compensated. The agreement is fully integrated, and it doesn't contain any mention of a cap on fees to be charged. As a term capping fees at $55K would certainly have been included in this Contract (which was between a lawyer and a law firm) if in fact it was part of the agreement, [Wykidal] cannot introduce extrinsic evidence to add to, vary or contradict the payment term. See CC 1856(a); PG&E. Further, by its terms the Agreement also states that any estimates are not a limitation of the fees that can be billed. There is no dispute as to whether [BWN] performed under the agreement, or whether [Wykidal] failed to pay the amounts invoiced, or the amount that remains due and owing. As all of the elements of a claim for breach of written Contract are established and [Wykidal] hasn't demonstrated the existence of any defense to this cause of action, there is no triable issue of material fact and Summary Adjudication must be granted in [BWN's] favor."

E. The Trial Court's Ruling on the Account Stated Claim

The trial court also granted summary adjudication of the claim for account stated, stating: "It is undisputed that [BWN] sent invoices to [Wykidal] by mail and email beginning in 11/08, and that [Wykidal] never objected to those invoices. [Wykidal's] letter dated 8/6/09 doesn't qualify as an objection to any amount billed; rather, it appears to be a request for some sort of renegotiation based on [Wykidal's] financial condition and, according to [Wykidal's] own concession, an expression of 'venting.' As the elements for an account stated claim are met by [BWN], and [Wykidal] hasn't demonstrated the existence of any defense to this cause of action, there is no triable issue of material fact and Summary Adjudication must be granted in [BWN's] favor."

F. The Trial Court's Ruling on the Request for an Offset

As to Wykidal's request for an offset for expert witness fees that he might have recovered under section 998, the trial court concluded that because the arbitration was conducted under the FAA, the Federal Rules of Civil Procedure applied and, under the

federal counterpart to section 998, the prevailing defendant may not recover expert witness fees.

VII. Judgment for BWN

The trial court entered judgment for BWN in the amount of $93,231.31 plus interest and costs. Wykidal moved for new trial, which was denied. This timely appeal followed.

DISCUSSION

I. The Demurrer Was Properly Sustained

A. Standard of Review

"'In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) 'To meet [the] burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court.' (*William S. Hart Union High School Dist. v. Regional Planning Com*. (1991) 226 Cal.App.3d 1612, 1621.) '[W]e may affirm a trial court judgment on any basis presented by the record whether or not relied

upon by the trial court.' (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1.)" (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 999.)

B. The Malpractice-Based Allegations

Wykidal challenges the sustaining of the demurrer to his legal malpractice and breach of fiduciary duty cross-claims on the ground that, because the underlying arbitration was conducted under the FAA and the Federal Rules of Civil Procedure, he could not have made a settlement offer under section 998. He argues that in view of the cross-complaint's allegation that the underlying arbitration was conducted under the JAMS Comprehensive Procedural Rules and California Code of Civil Procedure, we must assume for purposes of the demurrer that he could have made a "nominal" settlement offer under section 998. He claims that the acceptance of such an offer would have led to a settlement of the underlying arbitration for a nominal sum without the burden of incurring additional attorney fees. Conversely, he argues that the rejection of his nominal offer would have led to the reimbursement of his expert witness fees under section 998.

The problem with this contention is that it ignores the good faith requirement of section 998. Even assuming, as alleged, that the arbitration was conducted under the JAMS Comprehensive Procedural Rules and California Code of Civil Procedure, the fact that Wykidal could have offered a "nominal amount" does not satisfy the good faith requirement.

"[B]ecause the Legislature has made an award of costs under section 998 discretionary, appellate decisions have held that trial courts may properly consider whether the subject offer was made in good faith and was reasonable under the existing circumstances. [Citations.]" (*Barba v. Perez* (2008) 166 Cal.App.4th 444, 451.) "'To effectuate the purpose of the statute, a section 998 offer must be made in good faith to be valid. [Citation.] Good faith requires that the pretrial offer of settlement be "realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or

nominal offer will not satisfy this good faith requirement . . . ." [Citation.] The offer "must carry with it some reasonable prospect of acceptance. [Citation.]" [Citation.] One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees. [Citation.]' (*Jones v. Dumrichob* [(1998)] 63 Cal.App.4th [1258,] 1262-1263; see also *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.* [(1999)] 73 Cal.App.4th [324,] 332.)" (*People ex rel. Lockyer v. Fremont General Corp*. (2001) 89 Cal.App.4th 1260, 1271.)

The cross-complaint is silent as to whether a "nominal" offer to compromise the underlying arbitration carried some reasonable prospect of acceptance or was merely a no-risk offer made for the sole purpose of later recovering expert witness fees. Accordingly, the demurrer to the malpractice-based allegations was properly sustained.

We turn to whether Wykidal should be granted leave to amend the malpractice-based allegations to remedy this deficiency. "Generally, leave to amend is proper when 'there is a reasonable possibility the plaintiff could cure the defect.' (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) On appeal, 'the burden is on the plaintiff to show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' (*McMartin v. Children's Institute International* (1989) 212 Cal.App.3d 1393, 1408.)" (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 572.)

In light of Wykidal's failure to explain on appeal how the cross-complaint could be amended to allege facts to show that a token offer under section 998 would have been found to be reasonable and in good faith, the demurrer was properly sustained without leave to amend.

C. The Fraud-Based Allegations

In his fraud-based allegations, Wykidal asserted that he was fraudulently induced to enter into the Agreement by a false promise of a cap on fees. He alleged that during the fee negotiations, Brown falsely represented that BWN would handle the arbitration

"for no more than $55,000," which "was not an estimate" but "an outside cap on legal fees. Legal fees would not exceed that amount. When attorney Brown made this representation on his own behalf and on behalf of [BWN], the representation was false and both he and [BWN] knew it to be false." Brown allegedly made the false representation "with intent to induce reliance by [Wykidal] to enter into an engagement agreement." BWN allegedly ratified Brown's false representation and should not "be allowed to hide behind the merger or integration clause to avoid the consequences of its misrepresentation."

BWN successfully demurred to the fraud-based allegations on the ground that Wykidal was barred by the parol evidence rule from contradicting the express terms of the parties' written integrated Agreement, which did not contain a cap on fees.

Wykidal argues on appeal that the parol evidence rule does not apply to the fraud-based allegations because "an integration clause cannot defeat claims of fraud." As we will explain, this assertion was rejected by the California Supreme Court in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 346-347 (*Casa Herrera*).

The parol evidence rule is codified in Civil Code section 1625[5] and Code of Civil Procedure section 1856.[6] In general, the rule prohibits the introduction of any extrinsic

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[5] Civil Code section 1625 provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

[6] Code of Civil Procedure section 1856 provides: "(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. [¶] (b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement. [¶] (c) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance. [¶] (d) The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein and whether the writing is intended also as a complete and exclusive statement of

evidence to alter, vary, or add to the terms of an integrated written agreement. (*Casa Herrera*, *supra*, 32 Cal.4th at p. 343.) "The rule does not, however, prohibit the introduction of extrinsic evidence 'to explain the meaning of a written contract . . . [if] the meaning urged is one to which the written contract terms are reasonably susceptible.' (*BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 990, fn. 4.)" (*Casa Herrera*, *supra*, 32 Cal.4th at p. 343.) "The rule is one of substantive law based on the concept that a written integrated contract establishes the terms of the agreement between the parties and evidence that contradicts the written terms is irrelevant. [(*Herrera*, *supra*, 32 Cal.4th at pp. 343-344.)] '"[A]s a matter of substantive law [evidence that contradicts an integrated written agreement] cannot serve to create or alter the obligations under the instrument." [Citation.]' (*Id.* at p. 344.) In essence, the written agreement supersedes any prior or contemporaneous negotiations, either oral or written. (*Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1434 . . . .)" (*Duncan v. The McCaffrey Group, Inc*. (2011) 200 Cal.App.4th 346, 363.)

In *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263-264, the California Supreme Court held that parol evidence is inadmissible to prove "a promise directly at variance with the promise of the writing." One noted impact of the *Pendergrass* holding is that the parol evidence rule effectively immunizes against liability for prior or contemporaneous statements at variance with the written contract and implies that the alleged wrongdoer is innocent of fraud. (*Casa Herrera*, *supra*, 32 Cal.4th at p. 347.)

The Supreme Court recently reaffirmed the *Pendergrass* holding, stating: "Respondents' reliance on a comment to section 530 of the Restatement Second of Torts

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the terms of the agreement. [¶] (e) Where a mistake or imperfection of the writing is put in issue by the pleadings, this section does not exclude evidence relevant to that issue. [¶] (f) Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue. [¶] (g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud. [¶] (h) As used in this section, the term agreement includes deeds and wills, as well as contracts between parties."

is misplaced. Although the comment states that a promise made without the intention to perform may still support a cause of action for fraud, even though the promise 'is unprovable and so unenforceable under the parol evidence rule' (Rest.2d Torts, § 530, com. c, p. 64), we rejected this proposition long ago. (See *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263-264.) And, despite some criticism, our courts have consistently rejected promissory fraud claims premised on prior or contemporaneous statements at variance with the terms of a written integrated agreement. [Fn. omitted.] (See, e.g., *Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 867-871, 873 [following *Pendergrass* but holding that the parol evidence rule does not bar claims for violations of Civ. Code, § 1770, subd. (a)(14) and Bus. & Prof. Code, § 17200]; *Alling, supra*, 5 Cal.App.4th at p. 1436; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 419; *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 483-486.) Because the parol evidence rule effectively immunizes appellant from liability for prior or contemporaneous statements at variance with the written sales contract, the Court of Appeal's decision tends to show appellant's innocence of fraud. (See *Lackner* [*v. LaCroix* (1979)] 25 Cal.3d [747,] 751, fn. 2 ['A termination "inconsistent with wrongdoing" implies a lack of wrongful conduct and thus innocence—a favorable termination'].)" (*Casa Herrera, supra*, 32 Cal.4th at pp. 346-347.)

In light of the Supreme Court's reaffirmance of the *Pendergrass* holding, which squarely contradicts Wykidal's assertion that "an integration clause cannot defeat claims of fraud," we conclude he has failed to establish that the demurrer was erroneously sustained.

II. Summary Adjudication of the Breach of Written Contract Claim Was Proper

Wykidal contends that summary adjudication of the breach of written contract claim was erroneous because (1) BWN did not carry its initial burden of showing that its

fees were reasonable and (2) there are disputed issues of material fact.[7] We conclude that the contentions lack merit.

A. Standard of Review

Code of Civil Procedure section 437c, subdivision (f)(1) provides: "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty."

Code of Civil Procedure section 437c, subdivision (p)(1) provides: "For purposes of motions for summary judgment and summary adjudication: [¶] (1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the

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[7] Ordinarily, where a respondent obtains the identical relief under two separate causes of action but an appeal is taken only as to one, the relief granted under the other would render the appeal moot. In this case, BWN prevailed on both the breach of contract and account stated claims, but Wykidal has raised no issues on appeal concerning BWN's recovery of damages for an account stated. We conclude, however, that the breach of contract claim is not moot because the two theories of recovery are not interchangeable. The claims are not interchangeable because where, as here, an action is brought for damages arising from the breach of an express contract, there is no basis for an account stated. "The law is established in California that a debt which is predicated upon the breach of the terms of an express contract cannot be the basis of an account stated. (*Rio Linda Poultry Farms v. Fredericksen* [(1932)] 121 Cal.App. 433, 435 et seq.) In the present case the action was instituted to recover damages arising from the breach of an express contract for the payment of money. Therefore there was not any issue before the court relative to an account stated between the parties . . . ." (*Moore v. Bartholomae Corp*. (1945) 69 Cal.App.2d 474, 477-478.)

party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto."

"When reviewing the grant of a motion for summary judgment or summary adjudication [fn. omitted], we independently consider whether a triable issue of material fact exists and whether the moving party is entitled to summary judgment or adjudication as a matter of law. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) In reassessing the merits of the motion, we 'consider only the facts properly before the trial court at the time it ruled on the motion. [Citation.]' (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.)" (*Haney v. Aramark Uniform Services, Inc*. (2004) 121 Cal.App.4th 623, 631.)

"The issues to be addressed in a summary adjudication motion are framed by the pleadings. (*Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, 750.) 'Summary [adjudication] will be upheld when, viewing the evidence in a light most favorable to the opponent, the evidentiary submissions conclusively negate a necessary element of plaintiff[s'] cause of action, or show that under no hypothesis is there a material issue of fact requiring the process of a trial. [Citation.]' (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1024.)" (*County of Los Angeles v. Superior Court* (2009) 181 Cal.App.4th 218, 226.)

B. BWN Met Its Initial Burden on the Claim for Breach of Contract

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830.)" (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

The trial court found that BWN satisfied its initial burden of establishing the above four elements. Although Wykidal does not challenge the trial court's finding with respect to the four elements, he argues that BWN was required to establish as an additional element the reasonableness of its fees.

In support of this proposition, Wykidal cites only one case, *Civic Western Corp.*, *supra*, 66 Cal.App.3d 1, which did not involve a claim for breach of contract. As BWN correctly points out, the case is distinguishable because it involved the right to recover fees under Civil Code section 1717, which allows the prevailing party in an action on a contract to recover reasonable attorney fees as provided in that contract.

The contract at issue in *Civic Western Corp.* contained an attorney fee clause that provided "for reimbursement by the debtor to the creditor for attorney fees and related expenses incurred in obtaining the collateral, '*or* in the defense of any action or proceeding instituted or maintained vs. Company growing out of or connected with the subject matter of this agreement and/or the receivables pledged hereunder.'" (66 Cal.App.3d at p. 15.) In reference to this clause, the court stated that "[t]hese provisions relating to attorney's fees must be viewed in light of Civil Code section 1717, which states: 'In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, *whether he is the party specified in the contract or not*, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.' (Italics added.)" (*Id.* at p. 16.) Also in reference to this clause, the court stated "that attorney fees must be reasonable, and . . . the party claiming them must establish (1) not only entitlement to such fees but (2) the reasonableness of the fees claimed." (*Ibid.*)

Given that all references in *Civic Western Corp.* to "the reasonableness of the fees claimed" were made in the context of Civil Code section 1717, Wykidal's reliance on that decision is misplaced. The decision did not discuss the elements of a claim for breach of contract and therefore sheds no light on whether an attorney must prove that his fees were reasonable in order to recover on a breach of contract claim against a former

client. "It is axiomatic, of course, that a decision does not stand for a proposition not considered by the court. [Citations.]" (*People v. Harris* (1989) 47 Cal.3d 1047, 1071.)

C. Generally an Attorney Is Not Required to Prove the Reasonable Value of His Services When Suing for Payment of a Contract for an Agreed Fee

The general rule is that "the mode and measure of an attorney's compensation for services rendered to a client is a matter for contractual agreement between them. (*Tracy v. Ringole* [(1927)] 87 Cal.App. 549, 551; Code Civ. Proc., § 1021.) Where the attorney and the client each have the capacity to contract, and the fee is fixed or determined by their contract, such determination is generally binding on both parties. (*Cole v. Superior Court* [(1883)] 63 Cal. 86.) The client cannot escape full payment merely because the attorney's services proved to be less valuable than the parties had in mind when they entered into the contract. (*Reynolds v. Sorosis Fruit Co.* [(1901)] 133 Cal. 625, 630.) An attorney suing upon a contract for an agreed fee is not required to prove the reasonable value of his services. *MacInnis v. Pope* [(1955)] 134 Cal.App.2d 528, 530, held: 'This is not a case of "reasonable value." Plaintiff sued on a written contract fully performed. It would seem unnecessary to cite authority for the point that when an attorney fully performs the services required by the contract he is entitled to the fee stipulated in the contract.'" (*Berk v. Twentynine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625, 637 (*Berk*).)

An exception to the general rule applies "where the contract for compensation is entered into after the relationship of attorney and client has been established." (*Berk, supra*, 201 Cal.App.2d at p. 637.) Where the parties enter into a contract for compensation *after* the attorney-client relationship was established, "the burden is upon the attorney to show that the agreement for compensation was fair and openly made with full knowledge upon the part of the client of the facts and of his legal rights with relation thereto." (*Ibid.*) However, "[t]he cases are quite clear that this [exception] does not attach to a contract by which the relation of attorney-client is created and the

compensation of the attorney therein fixed. In agreeing upon the terms of such a contract, the parties deal at arm's length. [Citations.]" (*Ibid.*)

In his opening brief, Wykidal obliquely refers to the exception to the general rule by stating: "It is undisputed that attorney Brown gave substantial legal advice to Wykidal regarding the *Seaman* case on a number of occasions prior to the formal engagement. Wykidal believes this created a fiduciary duty by BWN when they gave him the formal retainer agreement."

In his separate statement of material facts, Wykidal arguably alluded to the exception to the general rule by asserting that "[t]he BWN firm provided legal advice to Wykidal via telephone regarding the Seaman lawsuit on several occasions in early and mid 2008," and "[b]ecause of Wykidal's prior involvement with attorney Brown including Brown providing Wykidal with legal advice on the Seaman matter, Wykidal placed confidence and trust with the BWN firm."

In his declaration, however, Wykidal presented a different picture of his relationship with Brown that does not support his assertion that he *received* substantial legal advice prior to the formal engagement. The declaration states merely that Wykidal *sought* legal advice. It does not state that any legal advice was given or that an attorney-client relationship was formed prior to the formal engagement. On the contrary, the declaration stated that Wykidal was "adamant" about representing himself in the underlying arbitration.

Wykidal's declaration provides: "I first met Tom Brown in approximately the first quarter of 2008 when I was introduced to him through a common client named Super Absorbent Company which was being sued by the California Department of Corporations. I was actually called as a witness by Tom Brown at an administrative hearing before the California Department of Corporations in early 2008. [¶] . . . Over the ensuing weeks and months, I would occasionally call Mr. Brown and seek legal advice concerning the *Seaman v. Wykidal* case. *I was adamant that I was going to represent myself since I was very confident that all of the allegations of legal malpractice in the Seaman v. Wykidal case were virtually baseless.* During many of these conversations

Mr. Brown would urge me to seek outside counsel. I made it very clear that I could not afford outside counsel and felt very confident that Judge Ryan would clearly recognize the lack of merit of the complaint and that I had not committed malpractice under any circumstances. My belief was so strong, I fully intended to sue Thomas Seaman and the Sheppard Mullin firm at the conclusion of the arbitration for malicious prosecution, but later found out that an action for malicious prosecution cannot be maintained once the parties have agreed to arbitrate their dispute."

As his declaration illustrates, Wykidal viewed himself as an experienced attorney who was "adamant" about representing himself. His declaration dispels any notion of a pre-existing attorney-client relationship when the Agreement was signed. Wykidal obviously believed while negotiating with Brown that he was dealing at arm's length with a fellow attorney who represented a mutual client. We therefore conclude that the exception to the general rule is inapplicable and the general rule applies: "An attorney suing upon a contract for an agreed fee is not required to prove the reasonable value of his services." (*Berk, supra,* 201 Cal.App.2d at p. 637.)

D. Wykidal Has Not Established the Existence of Triable Issues of Material Fact

Wykidal contends there are triable issues of material fact concerning the reasonableness of BWN's fees. He refers to the "excessive use" of an associate attorney, the firm's failure to inform him that "fees were going to exceed the quoted fee of $58,000," and the trial court's offhand remarks at hearings on the demurrer and writ of attachment proceeding. However, he does not address the trial court's ruling that he failed to provide admissible evidence to support his defense that the fees were unreasonable.

Wykidal's failure to address this aspect of the trial court's ruling is fatal to his appeal. "One of the essential rules of appellate law is that '[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]' (*In re Marriage of Arceneaux*

(1990) 51 Cal.3d 1130, 1133.) It is the duty of the appellant to present an adequate record to the court from which prejudicial error is shown. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1533.) Also, the appellant must present argument and authorities on each point to which error is asserted, or else the issue is waived. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.)" (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865.)

DISPOSITION

The judgment is affirmed. BWN is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.