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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BEN JEWELRY, INC., Plaintiff and Appellant, v. CHRISTOPHER A. EBERTS, Defendant and Respondent.	B269178 (Los Angeles County Super. Ct. No. BC550409)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Raphael, Judge. Affirmed.

Michael J. Frank for Plaintiff and Appellant.

Lesnick Prince & Pappas, Matthew A. Lesnick and Andrew R. Cahill, for Defendant and Respondent.

Plaintiff Ben Jewelry, Inc., a pawn shop, filed a lawsuit against defendant Christopher Eberts alleging he reneged on an agreement to repay a $700,000 loan he purportedly received from Ben Jewelry. Eberts moved for summary judgment, contending the lawsuit was meritless because he never received $700,000 from Ben Jewelry pursuant to the loan agreement. The trial court granted Eberts' motion for summary judgment, ruling Ben Jewelry had not come forward with admissible and competent evidence from which a jury could find Eberts had received the contemplated $700,000. We consider whether the trial court's summary judgment ruling was correct, and in doing so, we decide whether the court abused its discretion in making certain rulings concerning the admissibility of the evidence Ben Jewelry submitted to oppose summary judgment.

I. BACKGROUND

A. The First Amended Complaint

Ben Jewelry filed a first amended complaint (the operative complaint) against Eberts in January 2015 that alleged causes of action for breach of contract, common counts, and fraud.

The breach of contract cause of action alleged Ben Jewelry entered into a written agreement with Eberts whereby Eberts borrowed $700,000 from Ben Jewelry and promised to repay that amount, plus 36 percent per annum interest compounded monthly, in three months. As other portions of the operative complaint and the ensuing litigation between the parties revealed, the claimed "written agreement" was a promissory note dated September 10, 2008, allegedly signed by Eberts and his wife but unsigned by a representative of Ben Jewelry. The operative complaint further alleged that Ben Jewelry "has

performed all obligations to the defendants, including the loaning of $700,000.00," and that "[Eberts] never paid [Ben Jewelry] whatsoever."

The common counts cause of action re-alleged the facts asserted in the breach of contract cause of action and added the following three paragraphs: "20. That [Ben Jewelry] alleges that defendant [Eberts] became indebted to [Ben Jewelry] on an open book account for money due, loan, and/or because an account was stated in writing by and between [Ben Jewelry] and each defendant in which it was agreed that defendant was indebted to [Ben Jewelry]. [¶] 21. That for money loaned at the special instance [*sic*] and request of [Eberts] and for which defendant promised to pay [Ben Jewelry] the sum of $700,000.00 plus interest. [¶] 22. That [Ben Jewelry] is still entitled to pre-judgment interest at the rate of 36.0 percent per annum compounded monthly since September 10, 2008 on the sum of $700,000.00."

Ben Jewelry's cause of action for fraud alleged that Eberts represented on September 10, 2008, that he would obtain his wife's signature (or authority to sign her name) on a promissory note and provide a lien in the form of a trust deed on their jointly owned residence "in order to obtain a new money loan from [Ben Jewelry], return any collateral being held by [Ben Jewelry], and bind both" Eberts and his wife personally. According to the operative complaint, Ben Jewelry "returned [Eberts'] collateral to him, had him sign a $700,000 promissory recourse note as described above with a trust deed against their residence, and [Eberts] with a represented full power of attorney signed the note also with [his wife's] signature." The operative complaint further alleged the power of attorney documents were actually signed by

Eberts, not his wife, and the home was owned solely by Eberts' wife—which meant Ben Jewelry "had a mere unsecured promissory note."

B. Eberts' Motion for Summary Judgment

Eberts moved for summary judgment pursuant to Code of Civil Procedure section 437c.[1] Eberts' motion argued he never in fact received the $700,000 referenced in the promissory note, which meant Eberts had not breached any contract and Ben Jewelry could not prove damages (or certain other elements) in connection with its common counts and fraud causes of action. Eberts' motion further emphasized Ben Jewelry had waited more than five years to file suit to demand the purported loan repayment that was due in December 2008, and the motion maintained the only money Ben Jewelry ever loaned to Eberts was in the form of pawn transactions.

With his summary judgment motion, Eberts proffered two types of evidence to demonstrate Ben Jewelry could not establish a triable issue of fact on whether it actually loaned him $700,000 as reflected in the promissory note. First, Eberts submitted his own declaration. In it, Eberts acknowledged he had engaged in a number of pawn transactions with Ben Jewelry over the years, but he denied having a running loan balance with Ben Jewelry because he either repaid the principal loaned as part of those transactions (plus any applicable interest) or allowed Ben Jewelry to foreclose on the pawned items. Eberts specifically denied the loan transaction referred to in the September 10,

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[1] Undesignated statutory references that follow are to the Code of Civil Procedure.

2008, promissory note ever took place—in his words, "Ben Jewelry never funded the loan and I did not receive the $700,000 . . . ." Second, Eberts pointed to Ben Jewelry's responses to discovery requests seeking copies of all documents indicating Eberts borrowed $700,000 and any documents (e.g., cancelled checks, wire transfer records, or receipts) "evidencing that Eberts received $700,000 from YOU pursuant to the [promissory note]." Eberts submitted a declaration from counsel attaching copies of all documents produced by Ben Jewelry in discovery,[2] and Eberts contended there were no documents that, on their face, memorialized the transfer of $700,000 to him.

C. Ben Jewelry's Opposition to Summary Judgment, and Eberts' Evidentiary Objections

Ben Jewelry opposed Eberts' motion for summary judgment, arguing there was sufficient evidence to establish a genuine dispute of fact on the question of whether Eberts actually received a $700,000 loan pursuant to the promissory note. Ben Jewelry contended it had delivered $700,000 to Eberts in the form of "returned . . . pawn foreclosed collateral, worth an agreed $600,000.00" plus "an additional $100,000 cash given to [Eberts]."

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[2] The declaration from Eberts' attorney identified these documents as "Exhibit D" to the declaration. The declaration described Exhibit D as "a true and correct copy of the 'Objections and Responses to First Request for Production' that were prepared and served by [Ben Jewelry] in response to the Document Requests. This exhibit includes every document that has been produced by [Ben Jewelry] in this case."

Ben Jewelry's response to Eberts' separate statement of undisputed facts enumerated the evidence upon which it relied to contend a jury could find the $700,000 loan had actually been made. Specifically, Ben Jewelry cited the promissory note itself (which, it argued, gave rise to a presumption that the loan was made); three documentary exhibits; and deposition testimony from (1) Yossi Dina, Ben Jewelry's principal, (2) Shlomo Barash, Ben Jewelry's comptroller at the relevant time, and (3) Robert Freedman, a man who asserted he was aware Dina had given Eberts $100,000 in March of 2008. Ben Jewelry also cited this same evidence to dispute Eberts' assertion that it had produced no documentation evidencing the transfer of $700,000 to Eberts for the alleged loan. Because the documentary exhibits and the deposition testimony figure prominently in the resolution of this appeal, we shall describe both in greater detail.

Ben Jewelry submitted its evidence in opposition to summary judgment with no accompanying declaration from counsel, nor an explanatory declaration of any kind. Rather, the evidence was submitted with only a table of contents identifying the documents by exhibit number and including a short description of each. The two sentences that were included on the cover page of Ben Jewelry's evidentiary filing stated only that it was submitting the evidence in opposition to the summary judgment motion and that "[f]or evidentiary purposes," Exhibit D in Eberts' moving papers contained "a duplicate of Exhibits used in the opposition."

Ben Jewelry's Exhibit 3 is described in the table of contents as "Ben Jewelry Ledger of Eberts loans – foreclosed." The document itself appears to be a spreadsheet with various amounts listed along with corresponding dates between June

2004 and June 2013. Ben Jewelry's Exhibit 6 is described in the table of contents as "Ben Jewelry Inventory (Collateral) List of Eberts [*sic*]." It, too, appears to be a spreadsheet, and it includes a different list of amounts with corresponding dates between August 2005 and June 2008. The last of the three exhibits, Exhibit 7, is described in the table of contents as "Post-Note Writing signed by Eberts confirming collateral." It appears to be a pre-printed form, also bearing certain handwriting, that is headed by the notations "Beverly-Wilshire Jewelry & Loan" and "Consignment Contract."

Dina, the principal of Ben Jewelry, testified during his deposition that he could not remember various details of the claimed loan transaction. Dina initially appeared to testify he gave Eberts $100,000 in cash, but later in his deposition he stated "I don't do cash, $100,000" when asked whether the money paid to Eberts could have been cash. When asked how he paid Eberts the $100,000, Dina said, "I don't remember if it was a check or wire fund." Dina demurred, however, when asked if he had a cancelled check or wire transfer confirmation, explaining he could "look . . . for that" and would "have to check it out."[3] Dina did testify that the remainder of the loan amount he claimed to have extended to Eberts (i.e., all but the $100,000) was made in the form of merchandise Eberts had previously pawned that Dina returned to him. When asked, however, which pieces of collateral Dina had returned to Eberts in connection with the $700,000 promissory note, Dina said it was "expensive watches

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[3] We have been directed to nothing in the record before us that would suggest Dina later found any cancelled check or wire transfer confirmation.

and jewelry" but conceded he could not "remember exactly what was it."[4]

Barash (Ben Jewelry's comptroller) testified during his deposition that he drafted the $700,000 promissory note at Dina's direction. Dina provided Barash with the $700,000 amount to include on the promissory note, but Dina did not say what it was for and Barash "just assumed that [Dina] lent Mr. Eberts $700,000."[5] Barash was asked if he remembered when he drafted the promissory note, and he replied that he remembered only because the note itself has a date on it (September 10, 2008). Barash was also asked whether he talked to Eberts about creating the promissory note before he drafted it, and Barash replied: "I don't remember exactly when I talked to him, but it was in the office. We were like here discussing things, but I really don't remember exactly what we said." Later during his deposition, however, Barash claimed to have personal knowledge

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[4] Dina was also asked whether he would have records showing which merchandise was purportedly returned to Eberts, but he responded only by saying "maybe," explaining it was "so long ago."

[5] Barash testified he had nothing in his books and records that corresponded to a $700,000 loan. He also conceded he did not know what the $700,000 loan consisted of and he had no understanding of when any such sum had been lent to Eberts. In addition, Barash was asked if the reason he did not record anything in Ben Jewelry's books in September 2008 was because "there was no cash transaction at that time associated with this [promissory] note." Barash answered: "That's one thing. Also, I couldn't just increase [Dina's] receivable to $700,000. I had no other documentation."

Eberts was provided money pursuant to the promissory note. When asked what the basis of this personal knowledge was, Barash stated "Mr. Dina and Mr. Eberts told me that he received money and that's why he wanted to sign the note."[6]

The three-page excerpt of Freedman's deposition testimony submitted by Ben Jewelry in opposition to summary judgment was from a deposition taken not in this action but in a bankruptcy action filed by Eberts. According to the excerpt, Freedman testified he was aware Dina gave Eberts $100,000 in March 2008 because Eberts told Freedman so and Freedman "was in the office when he gave it to him." Freedman was asked whether the loan was in written form (i.e., whether there was a note) and he answered, "[n]o, [Dina] gave it to him."

After Ben Jewelry submitted its evidence in opposition to summary judgment, Eberts filed evidentiary objections. Eberts objected to the documents Ben Jewelry designated as Exhibits 3, 6, and 7 on several grounds, including the ground that they had not been properly authenticated. Eberts also objected to various

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[6] Barash testified this conversation involving Dina and Eberts took place in Dina's office. Barash was asked, "[t]o the best of your recollection, what did they say and who said it?" Barash responded, "This was Mr. Dina and Mr. Eberts and they told me to prepare a note for $700,000." When asked to elaborate about the meeting, Barash testified: "That meeting Mr. Eberts came in, and I guess he probably talked before then with Mr. Dina, I'm not sure, but they called me and they asked me to prepare a note for $700,000." Barash conceded neither Dina nor Eberts told him any details about what the $700,000 related to. Barash testified he could not recall what time of day the meeting took place, and when asked whether anyone else participated in the meeting, he replied, "[n]ot specifically."

portions of Barash's deposition testimony, arguing that it lacked foundation, "that Mr. Barash is basing his testimony on hearsay and assumptions, and that he has no personal knowledge that Ben Jewelry loaned $700,000 to Eberts in connection with the [promissory note]."[7]

D. The Trial Court's Ruling

The trial court sustained Eberts' evidentiary objections to Ben Jewelry's Exhibits 3, 6, and 7 and to Barash's deposition testimony. As to the exhibits, the court found they had not been properly authenticated. As to Barash's deposition testimony, the court sustained the objection "to the extent the statements in the deposition transcript are used to support the fact that [Ben Jewelry] transmitted $700,000 to [Eberts] according to the loan agreement. Other statements in the deposition transcript contradict that the witness had personal knowledge of the transmission. Accordingly, the statements lack foundation and are speculative."

On the ultimate question of whether Eberts' was entitled to summary judgment, the trial court remarked during the summary judgment hearing that it was "very sensitive to the summary judgment standards" and that Ben Jewelry's "burden is

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[7] Ben Jewelry filed a written response to Eberts' evidentiary objections. It argued Eberts could not object to Exhibits 3, 6, and 7 because they were included in Eberts' own Exhibit D submitted in support of summary judgment (the copy of all documents produced by Ben Jewelry in discovery). Ben Jewelry also argued Eberts could not object to Barash's deposition testimony to the extent Barash's answers had come in response to questions asked by Eberts' counsel.

to simply create a triable issue." The court took the matter under submission and later issued a written ruling concluding summary judgment for Eberts was warranted because there was no dispute of material fact requiring a trial.

The trial court reasoned that all of Ben Jewelry's causes of action required proof that Ben Jewelry actually transmitted $700,000 to Eberts. The court found that Eberts' declaration denying he ever received $700,000 was therefore sufficient evidence to discharge his initial burden on summary judgment and shift the burden of production to Ben Jewelry to come forward with evidence demonstrating the existence of a triable, material factual issue. After reviewing Ben Jewelry's evidence in detail, the court concluded Ben Jewelry's proffered "documents and testimony do not create a triable issue of fact, which is needed to discharge [Ben Jewelry's] burden once [Eberts] has flatly denied ever receiving $700,000 pursuant to the parties' agreement. Much of [Ben Jewelry's] evidence is contradictory, and some of it tends to support the conclusion that $700,000 was not provided to [Eberts] as performance on the agreement."

II. DISCUSSION

In a 2008 case involving an appeal from a trial court's ruling on summary judgment, the Court of Appeal observed its "task in undertaking a de novo review . . . has been simplified in that virtually every piece of evidence submitted by [the plaintiff] in opposing summary judgment was excluded in response to [the defendant's] objections. Stripped of the excluded evidence, there is absolutely nothing to support [the plaintiff's] theory." (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1195-1196.) That is quite close to the situation we confront here. We

hold the trial court did not abuse its discretion in sustaining the aforementioned objections to Ben Jewelry's exhibits and the deposition testimony of Barash. Without this evidence, the remainder of the evidence Ben Jewelry cited in opposition to summary judgment—the deposition testimony of Dina and Freedman, plus the mere existence of the promissory note—is too speculative and equivocal to demonstrate a triable issue of material fact exists on the question of whether Eberts in fact received a $700,000 loan. Summary judgment for Eberts was warranted.

A. Summary Judgment Law, and the Standard of Review on Appeal

"The purpose of the summary judgment procedure is to identify those cases in which 'there is no triable issue as to any material fact . . . .' (§ 437c, subd. (c).) For practical purposes, an issue of *material* fact is one which, in the context and circumstances of the case, 'warrants the time and cost of factfinding by trial . . . .' [Citation.] In other words, not every issue of fact is worth submission to a jury. The purpose of summary judgment is to separate those cases in which there are *material* issues of fact meriting a trial from those in which there are no such issues." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162 (*Sangster*).)

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law . . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the

party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "[W]here the parties have had sufficient opportunity adequately to develop their factual cases through discovery and the defendant has made a sufficient showing to establish a prima facie case in his or her favor, in order to avert summary judgment the plaintiff must produce substantial responsive evidence sufficient to establish a triable issue of material fact on the merits of the defendant's showing. [Citations.] For this purpose, responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact. [Citations.]" (*Sangster*, *supra*, 68 Cal.App.4th at pp. 162-163; see also § 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 850; *Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411, 415 ["The plaintiff must produce "'*substantial*'" responsive evidence sufficient to establish a triable issue of fact"]; *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1589 [citing *Ahrens v. Superior Court* (1988) 197 Cal.App.3d 1134 for the proposition that "opposing evidence that is merely equivocal will not suffice to raise a triable fact issue"].)

A moving defendant will succeed if the defendant demonstrates the plaintiff cannot establish at least one element of the plaintiff's cause(s) of action, either by showing the plaintiff does not possess, and cannot reasonably obtain, needed evidence, or by conclusively negating an essential element of the plaintiff's claim. (*Aguilar*, *supra*, 25 Cal.4th at pp. 853-854.) The defendant may establish an absence of evidence by pointing to

"factually devoid discovery responses." (*Collin v. Calportland Co.* (2014) 228 Cal.App.4th 582, 587.)

On appeal from the grant or denial of summary judgment, we review the matter de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. (*State of California v. Allstate Ins. Co*. (2009) 45 Cal.4th 1008, 1017-1018; *Aguilar*, *supra*, 25 Cal.4th at p. 843.) Both Ben Jewelry and Eberts maintain we should review the trial court's evidentiary rulings for abuse of discretion, and that is the standard of review we shall employ. (See, e.g., *Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 505.)

B. The Trial Court's Evidentiary Rulings Were Not an Abuse of the Court's Discretion

1. Ben Jewelry's Exhibits 3, 6, and 7

Authentication is a necessary condition of admissibility. (Evid. Code, § 1401.) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400; accord, *Kinda v. Carpenter* (2016) 247 Cal.App.4th 1268, 1283 (*Kinda*).) "The proof necessary for authentication depends on 'the purpose for which the evidence is being offered' and requires a foundation of 'sufficient evidence for a trier of fact to find that the writing is what it purports to be.'" (*Kinda*, *supra*, at p. 1283.)

When submitting Exhibits 3, 6, and 7, Ben Jewelry provided no declaration of any kind that would establish the

writings were what Ben Jewelry apparently claimed them to be. Indeed, with only the terse descriptions Ben Jewelry provided in its "table of contents," we can at most guess at what the writings do in fact purport to be. That is not authentication, and absent authentication, the documents were inadmissible.

Ben Jewelry counters it did not need to authenticate its Exhibits 3, 6, and 7 because they were among the larger set of documents that Eberts had submitted as Exhibit D with his motion for summary judgment. The argument is meritless; that is not the way authentication works.

Eberts submitted every document produced by Ben Jewelry as Exhibit D with a declaration from counsel authenticating the documents as only that and nothing more, i.e., documents Ben Jewelry had produced. That Eberts' attorney authenticated the set of documents for that purpose does not mean individual documents within that production were thereby authenticated as what Ben Jewelry would apparently claim they purport to be, for instance, a true and correct copy of business records memorializing transactions with Eberts. (*Kinda*, *supra*, 247 Cal.App.4th at p. 1283; see also *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 854 [documents offered by the plaintiff not made admissible simply because they bear Bates-stamped numbers indicating they were produced by the defendants].) The trial court therefore correctly ruled Ben Jewelry's Exhibits 3, 6, and 7 were unauthenticated and inadmissible.

2. Barash's deposition testimony

The trial court excluded Barash's deposition testimony "to the extent the statements in the deposition transcript are used to

support the fact that [Ben Jewelry] transmitted $700,000 to [Eberts] according to the loan agreement." The court found the testimony on this point lacking in foundation, speculative, and contradicted by other of Barash's statements during the deposition revealing he lacked personal knowledge of whether Ben Jewelry had consummated the $700,000 loan transaction with Eberts.

The trial court's determination that Barash's testimony lacked foundation and a proper basis in personal knowledge as to whether Ben Jewelry transmitted $700,000 to Eberts (in whatever form, be it merchandise or cash) was not an abuse of its discretion. While Barash claimed during his deposition that Eberts told him he received $700,000 pursuant to the promissory note, earlier in his deposition he acknowledged he really did not remember exactly what he discussed with Eberts about creating the promissory note before he drafted it. When asked to provide specific details about the meeting during which Eberts purportedly made an admission about receiving money, Barash answered that Dina and Eberts asked him to "prepare a note for $700,000," which is something quite different than an alleged admission to having *received* that sum of money. Moreover, Barash indicated he had no independent recollection of the date on which the meeting between Eberts and Dina occurred, no recollection of the time of day of the meeting, and he answered "not specifically" when asked whether anyone else had been present. The trial court's determination that Barash's testimony regarding whether Eberts received $700,000 was lacking in foundation and insufficiently grounded in personal knowledge given these and other portions of his testimony did not exceed the

bounds of reason. (*Serri v. Santa Clara University*, *supra*, 226 Cal.App.4th at p. 852.)

C. The Admissible Evidence Reveals No Dispute of Material Fact Warranting Trial

As framed by the operative complaint, proof that Ben Jewelry actually provided $700,000 to defendant is essential to all three of its causes of action.[8] (*Hutton v. Fidelity Nat. Title Co.* (2013) 213 Cal.App.4th 486, 493 [a defendant moving for summary judgment need only negate the plaintiff's theories of liability as alleged in the complaint].) A contract cause of action requires proof of a plaintiff's performance or an excuse for non-performance. (*Reichert v. General Insurance Co.* (1968) 68 Cal.2d 822, 830 [breach of contract claim requires proof of 1) the existence of the contract, 2) plaintiff's performance or excuse for non-performance, 3) defendant's breach, and 4) resulting damages].) A common counts claim requires proof of a transfer of consideration. (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [essential elements of a common counts claim are indebtedness, consideration, and nonpayment].) And a claim of fraud, even if not premised on a loan agreement, requires proof of damages, i.e., some loss attributable to reliance on a misrepresentation. (*Cadlo v. Owens-Illinois, Inc.* (2004) 125

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[8] Ben Jewelry's opening brief includes several passing references to alternate theories of liability that in its view would suffice to establish liability on the common counts and fraud causes of action even if Eberts never received $700,000 in connection with the promissory note. These theories are not fairly presented by the operative complaint and we do not consider them.

Cal.App.4th 513, 519 [elements of fraud are a misrepresentation, knowledge of the falsity of the misrepresentation, intent to induce reliance on the misrepresentation, justifiable reliance, and resulting damages].)

The mere existence of the promissory note allegedly signed by Eberts, just like any other written instrument, qualifies as "presumptive evidence of a consideration." (Civ. Code, § 1614.) Eberts, however, submitted a sworn declaration categorically averring the loan transaction referenced in the promissory note never took place and the promissory note was never funded. Eberts' evidentiary submission was sufficient to shift the burden of production to Ben Jewelry to produce substantial, admissible evidence that it had in fact transferred $700,000 in value to him. (*Aguilar*, *supra*, 25 Cal.4th at pp. 850-851 [prima facie showing is one that is sufficient to support the position of the party in question]; see *Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1168 [defendant in medical malpractice case carried initial burden of production to make prima facie showing of the nonexistence of a triable issue of material fact by supporting summary judgment motion with the declaration of a medical expert].)

The only admissible evidence produced by Ben Jewelry in opposition was the deposition testimony of Dina and Freedman.[9]

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[9] Ben Jewelry also submitted a declaration from Barash that states "Eberts was provided money pursuant to Exhibit E [the promissory note]." This conclusory statement is insignificant for purposes of analyzing whether there existed a dispute of material fact requiring trial.

Simply put, this testimony was not enough to establish a disputed issue of material fact requiring trial.[10]

Dina was the only witness who claimed personal knowledge of the purported $700,000 loan payment. As we have described in setting forth the background facts of this case, however, Dina contradicted himself and could not remember how he purportedly transferred money and/or collateral to defendant. His testimony was plagued by equivocal statements, conclusory assertions, and elements of speculation. Ben Jewelry also provided no evidence of a bank withdrawal, check, or wire transfer of $100,000, and it produced no admissible records from which a jury could find it returned $600,000 worth of collateral to defendant.

Turning to Freedman's deposition, he testified he was aware Dina had given $100,000 to Eberts, but even accepting that testimony as true, Freedman placed this event six months before September 2008, and there was nothing in his testimony that related that payment to the execution of the promissory note

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[10] Ben Jewelry contends the trial court, in granting summary judgment, "used the wrong standard, improperly weighed evidence, [and] evaluated credibility . . . ." In our judgment, the contention is both irrelevant and incorrect. It is irrelevant because our review is de novo and we have applied the well-established summary judgment standard as articulated by our Supreme Court in *Aguilar* and pertinent Court of Appeal cases. It is incorrect because our review of the record, including the transcript of the summary judgment hearing and the trial court's later written ruling, leaves us convinced the trial court was well aware of the correct summary judgment legal standard and faithfully applied that standard in deciding to grant Eberts' motion.

in question or that indicated it was part of a larger $700,000 loan transaction.

A party opposing a motion for summary judgment cannot rely upon "assertions that are 'conclusionary, argumentative or based on conjecture and speculation.'" (*Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1404.) Opposing evidence that is merely equivocal will not suffice to raise an issue of triable fact. (*Stewart v. Preston Pipeline Inc.*, *supra*, 134 Cal.App.4th at p. 1589.) Under these well-accepted principles, the excerpts of Dina and Freedman's depositions that Ben Jewelry submitted would not "allow a reasonable trier of fact to find the underlying fact [i.e., the transfer of consideration or damages] in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) Summary judgment was proper.

DISPOSITION

The judgment is affirmed. Respondent shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KIN, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.