Filed 5/30/17 LeMieux v. K&M Meat Co. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CRYSTAL LeMIEUX, Plaintiff and Appellant, v. K&M MEAT COMPANY, INC., Defendant and Respondent.	B268283 (Los Angeles County Super. Ct. No. VC063581)

APPEAL from a judgment of the Superior Court of Los Angeles County. Roger T. Ito and Robert J. Higa, Judges. Affirmed.

Magarian & DiMercurio, Mark D. Magarian and Krista L. DiMercurio for Plaintiff and Appellant.

Dapeer, Rosenblit & Litvak, William Litvak and Eric P. Markus for Defendant and Respondent.

Plaintiff and appellant Crystal LeMieux appeals from a judgment following a successful defense motion under Code of Civil Procedure section 631.8. LeMieux has been an employee of defendant and respondent K&M Meat Company (K&M) since 1992. Her claims are based on an alleged written employment agreement that she entered into in 1992 when she first started working at K&M. The case proceeded to trial on the understanding that the agreement was described in a letter from LeMieux dated July 17, 1992, that was countersigned by Felix Goldberg, the owner of K&M, that same day. During trial, it emerged that this agreement had been superseded by a later version of the July 17 letter, containing a different compensation term, that Goldberg had executed four days later. The trial court denied LeMieux's motion to amend her complaint to incorporate the new agreement and, finding that the case had proceeded on the basis of a contract that was no longer operative, granted K&M's motion for judgment.

LeMieux claims that the trial court's denial of her motion to amend was an abuse of discretion. She also asks this court to reverse an earlier ruling by the trial court granting a motion for summary adjudication on LeMieux's cause of action for alleged Labor Code violations. K&M moved for summary adjudication on that cause of action on the ground that the asserted Labor Code sections apply only to *former* employees. LeMieux failed to oppose that motion, and the trial court granted it.

We conclude that the trial court acted within its discretion in denying LeMieux's mid-trial motion to amend, which would have substituted a new agreement with a different compensation term in place of the alleged agreement that had been the focus of pretrial discovery and trial preparation. In light of our

disposition, LeMieux's cause of action under the Labor Code is moot, as it concerns compensation that LeMieux claimed under the superseded agreement. We therefore affirm the judgment.

BACKGROUND

1. *LeMieux's Employment*

K&M was founded by Goldberg's father, who passed away in 1991. K&M sells meat to institutional customers, such as restaurants and hotels.

When K&M hired LeMieux in 1992, she was the first full time sales person the company had employed. K&M's gross sales for 1991 were just under $12 million. By 2014, K&M's sales had increased to over $90 million.

Before going to work at K&M, LeMieux had been employed at a larger food sales company, West Coast Foods, for about 15 years. When that company went out of business, she moved to another food sales business, Goldberg & Solovy, which was slightly larger than K&M at the time. She worked at Goldberg & Solovy only four months before Goldberg recruited her to go to work at K&M.

The parties had different understandings of the terms under which LeMieux agreed to come to work at K&M. Goldberg testified that his understanding was that LeMieux would have the same compensation that she received at West Coast Foods, which was a salary of at least $2,000 per week, reimbursement for expenses, and 3 percent of gross sales for *her own* clients. He said that LeMieux also wanted her employment agreement to last for at least two years, because she was concerned that Goldberg might sell the company. LeMieux testified that, because she was the only salesperson at K&M, she was to receive 3 percent of *K&M's* gross sales above K&M's "original"

$12 million in annual sales, with a guaranteed "draw" of $2,000 per week. The parties executed several versions of a written employment agreement (discussed below).

LeMieux was never paid under the employment agreement. She testified that she raised the topic of money due under the agreement on at least a dozen occasions with Goldberg, and he promised that he would give her the money. In contrast, Goldberg testified that LeMieux asked for more compensation several times over the years, but that they never discussed the 3 percent figure in the employment agreement. The evidence showed that LeMieux did receive some raises and additional benefits over the course of her employment as well as commissions on at least one customer account. LeMieux did not make any written request for the 3 percent until 2012.

LeMieux testified that her relationship with Goldberg began to change in 2012. She had always had a close working relationship with him, but in 2012 he began treating her more as "an employer" than as a friend or family. Goldberg took away a few of her accounts. The relationship further deteriorated after a meeting in May 2013 in which LeMieux felt she was singled out for poor performance. Following the meeting, LeMieux wrote an e-mail to Goldberg in which she referred to the July 17 agreement and demanded her 3 percent of K&M's gross sales increases. Goldberg responded, stating, among other things, that the "commission over-ride has long since been discarded," and that LeMieux has always been an " 'at will' " employee. LeMieux filed her lawsuit five months later, in October 2013.

2. *The Two Employment Agreements*

The parties agreed that LeMieux prepared a letter dated July 17, 1992, with a countersignature by Goldberg bearing the

same date, that purported to describe the terms of her employment (the July 17 Agreement). According to the July 17 Agreement, LeMieux was entitled to: (1) reimbursement of $5,000 that she had to pay to her prior employer and indemnification by K&M for any "legal ramifications" resulting from her resignation from her prior job; (2) three weeks paid vacation per year; (3) $250 telephone allowance and reimbursement of business expenses; and (4) the right to "[cash] out" her contract if K&M was sold prior to the end of two years.

The July 17 Agreement also contained a compensation term in paragraph 2 of the letter stating that LeMieux would receive a "minimum of $2,000.00 per week." In addition, the compensation term provided that, "[a]t the end of each year, if 3% of the total gross sales increase of K&M Meat Co. is greater than my salary, my salary will increase to that level for the following year. Monthly and yearly sales reports will be made available to me."

When attached to LeMieux's complaint and introduced as exhibit 1 at trial, the July 17 Agreement included a second page consisting of a notary stamp superimposed over a copy of a letter dated July 17, 1992, from LeMieux to Goldberg. The notary stamp on the second page was dated July 22, 1992. Goldberg's countersignature also appeared, bearing a date of July 21, 1992.

During his trial testimony, Goldberg initially seemed to agree that he had signed two copies of the same letter, once on July 17, 1992 and once on July 21, 1992. However, as trial proceeded, it became clear that the two copies of the July 17 letter that were included as pages 1 and 2 of exhibit 1 were in fact not the same agreement.

Prior to the start of trial, K&M had requested that LeMieux produce the original of her employment agreement. The

document that LeMieux provided (marked as trial exhibit 116) contained Goldberg's July 21, 1992 signature, but was different from the July 17 Agreement. Instead of the provision for adjustments to LeMieux's salary based on K&M's sales, this document (the July 21 Agreement) contained a different version of paragraph 2 describing a commission structure.

Like the July 17 Agreement, paragraph 2 in the July 21 Agreement provided that LeMieux would "receive a minimum of $2,000 per week." However, paragraph 2 in the July 21 Agreement then stated that "[a]t the end of each month, if 3% of the total gross sales increase of K&M Meat Co. is greater than the amount I have been paid during that month, I will receive a commission check for the difference by the second pay period of the following month." Thus, rather than adjustments to salary, the July 21 Agreement provided for payment of commissions based upon K&M's sales increases for each month.

LeMieux kept the originals of both the July 17 Agreement and the July 21 Agreement in her safe. She testified that she had forgotten about the July 21 Agreement until she saw it in court. She originally gave a copy of the July 17 Agreement to her attorneys, and then gave them a copy of the July 21 Agreement when the original was requested for trial.[1]

Goldberg testified that he never received a fully executed copy of the July 17 Agreement. According to Goldberg, K&M's files contained an unsigned copy of the employment agreement,

---

[1] LeMieux admitted that the July 17 Agreement was not notarized. She also admitted that attaching the notarization to exhibit 1 (the July 17 Agreement) and including that document with her complaint amounted to a representation that the July 17 Agreement had been notarized.

but he could not remember whether it was the July 17 Agreement or the July 21 Agreement.

In a declaration submitted with K&M's opposition to LeMieux's motion to amend, K&M's counsel explained that they decided to request production of the original employment agreement when they examined the copy of the agreement attached to LeMieux's complaint (exhibit 1) the night before trial began. They noticed that the second page of the document bearing the notary stamp and the July 21, 1992 signature of Goldberg contained an important difference in wording from the first page. The sentence in paragraph 2 just above the notary stamp on the second page read, "At the end of each *month*." (Italics added.) In contrast, the same sentence on the first page of the agreement read, "At the end of each *year*." (Italics added.) K&M's counsel testified that, "[a]t that moment, for the first time, our office realized that there must be a second, later in time agreement signed by the Parties."

3. *The Trial Court's Ruling*

At the conclusion of LeMieux's case, K&M moved for judgment under Code of Civil Procedure section 631.8, and LeMieux moved to amend her complaint to incorporate the July 21 Agreement. The court denied the motion to amend and granted the motion for judgment.

The court found that the July 21 Agreement superseded the July 17 Agreement. The court concluded that the motion to amend was "more than just to amend the pleadings," but was a request to "change the contract." The court found that such an amendment would be improper under the case law.

Because the July 21 Agreement superseded the July 17 Agreement, the court also concluded that "plaintiff's complaint

and all of the causes of action are based on a nonexistent contract." The court therefore granted K&M's motion for judgment.[2]

DISCUSSION

The trial court's finding that LeMieux's complaint was "based on a nonexistent contract" was, in essence, a ruling that there was a material variance between the cause of action alleged in LeMieux's complaint and the case she put on at trial. A material variance between the theories that are pleaded and those that are proved at trial can justify dismissal. (See Code Civ. Proc., § 471; *Nelson v. Specialty Records, Inc.* (1970) 11 Cal.App.3d 126, 140–141 [dismissal properly granted where the plaintiff's complaint alleged that a contract was fully performed but plaintiff claimed at trial that performance was waived].) Alleging one contract and proving another can lead to such a fatal variance. (*Sublett v. Henry's etc. Lunch* (1942) 21 Cal.2d 273, 277 ["Proof of an oral contract where a written agreement has been alleged is a material variance between pleading and proof which requires reversal if the variance has actually misled the adverse party to his prejudice"].)

Here, LeMieux does not challenge the trial court's decision to dismiss the case once it had denied amendment of her complaint to conform to proof. In fact, LeMieux acknowledges in her reply brief that, based on the status of the pleadings at the time of trial, the "operative complaint was indeed 'based on a nonexistent contract.' " Thus, we need not consider whether

---

[2] On December 23, 2015, LeMieux filed another action against K&M, asserting claims under the July 21 Agreement. (*LeMieux v. K&M Meat Company, Inc.* (Super. Ct. L.A. County, No. VC065234).)

there was a fatal variance between the complaint and the proof at trial in the absence of an amendment.[3] We therefore address only the trial court's decision to deny the motion to amend. However, before discussing the propriety of that decision, we first consider K&M's claim that LeMieux waived the right to raise that issue on appeal.

1. *LeMieux Appealed From the Judgment and Therefore Preserved Her Right to Challenge the Trial Court's Order Denying Her Motion to Amend*

K&M argues that LeMieux "abandoned any appeal of the granting of the Motion for Judgment" by challenging only the trial court's order denying her motion to amend. K&M claims that, by addressing only the trial court's denial of her motion to amend and not the judgment itself, LeMieux "has deprived this Court of jurisdiction" to consider her appeal.

The basis for K&M's argument is unclear. K&M correctly states that an order denying a motion to amend "may only be reviewed on appeal from the judgment." But that is precisely the

---

[3] Courts have stated the general principle that " '[w]hen a cause of action is based upon one contract and the proof establishes an entirely different contract, the case is one of failure of proof.' " (*Fineberg v. Niekerk* (1985) 175 Cal.App.3d 935, 939, *quoting Johnson v. De Waard* (1931) 113 Cal.App. 417, 422.) In both *Niekerk* and *De Waard* the courts concluded that there was no material variance because the contract that was pled and the contract that was proved were the same in most respects, and the defendant actually brought the second contract into the case. (See *Niekerk* at p. 940; *De Waard* at pp. 422–423.) In contrast, the most significant contract term in the contracts at issue here—the compensation provisions—were materially different in the July 17 Agreement and the July 21 Agreement.

procedural posture of this case. LeMieux filed a notice of appeal from the final judgment. In so doing, she preserved her right on appeal to challenge the court's order denying her motion to amend. (*Warfield v. McGraw-Hill, Inc.* (1973) 32 Cal.App.3d 1041, 1042.)

If K&M's argument is that, to prevail on appeal, LeMieux must show *prejudice* from the trial court's decision as well as error, K&M is correct. LeMieux must show not only that the trial court erred in denying her motion to amend, but also that "a different result would have been probable" in the absence of the error. (Code Civ. Proc., § 475; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800–801.) In the context of this appeal, the "different result" would have been a decision to deny K&M's motion for judgment.

While correct, the point is irrelevant for several reasons. Because LeMieux challenges the stated ground for the trial court's decision to enter judgment, her theory of prejudice is apparent. LeMieux argues that the trial court should have granted her motion to amend the complaint and then proceeded with trial after a recess to permit some additional discovery. If the trial court had permitted amendment of the complaint to allege breach of the July 21 Agreement rather than the July 17 Agreement, the basis for the dismissal—that LeMieux's case was based on a "nonexistent contract"—would no longer have applied. LeMieux therefore sufficiently identified the prejudice she experienced as a result of the trial court's ruling.

In any event, because we affirm the trial court's decision to deny the motion to amend, the issue of prejudice is moot. We therefore do not reach the issue whether the outcome would have been different if the trial court had permitted the amendment.

But that is because it is not necessary to do so and not, as K&M claims, because we lack jurisdiction to consider LeMieux's appeal.[4]

2. *The Trial Court Acted Within its Discretion in Denying LeMieux's Motion to Amend*

a. *A trial court has discretion to deny an amendment to conform to proof that raises new factual issues*

The decision whether to permit an amendment to conform to proof at trial "rests largely in the discretion of the trial court and its determination will not be disturbed on appeal unless it clearly appears that such discretion has been abused." (*Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31 (*Trafton*). Our Supreme Court has cautioned that " 'amendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend.' " (*Ibid.*, quoting *Lavely v. Nonemaker* (1931) 212 Cal. 380, 385 (*Lavely*).)

In *Trafton*, the plaintiff (Trafton) sued his former lawyer for legal fees that the lawyer had allegedly withdrawn from an

---

[4] Because we affirm the decision to deny the motion to amend, we also need not address K&M's argument that there are alternative grounds to uphold the judgment. However, we note that the grounds that K&M identifies are based on factual contentions that the trial court never reached. We therefore would not decide them in the first instance on appeal. (*Oildale Mutual Wat. Co. v. North of the River Mun. Wat. Dist.* (1989) 215 Cal.App.3d 1628, 1634–1635 ["Although an appellate court has authority to make findings of fact under certain circumstances [citation], it should not do so where, as here, the trial court has made no findings on the issue, and the evidence is in conflict"].)

escrow without authorization. The lawyer defended the former client's claim on the theory that the evidence showed an account stated for the fees. When the court rejected that defense in its memorandum decision, the lawyer sought to amend his answer to assert a set-off to the plaintiff's recovery for the reasonable value of his legal services. The Supreme Court affirmed the trial court's denial of the amendment, concluding that "the allowance of defendant's purported amendment to conform to the proof would have substantially prejudiced Trafton who had had no opportunity to offer evidence on such issue during the trial." (*Trafton, supra,* 69 Cal.2d at p. 32.)

In *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, this court cited *Trafton* in holding that the trial court committed reversible error in permitting an amendment at trial to allege a contractual theory of recovery that was different from the theory described in the complaint. Duchrow, an attorney, sued Forrest, a former client, for fees incurred in representing Forrest in a civil suit against Forrest's employer. Duchrow withdrew from Forrest's case at the beginning of trial. Duchrow's complaint against Forrest sought fees under a paragraph of his retainer agreement that provided for a contingency fee along with payment of some hourly fees and costs. (*Duchrow*, at p. 1362.) During trial, after Duchrow had rested, he moved to amend the complaint to seek hourly compensation for all the time he spent on the case under a different basis for recovery (i.e., withdrawal for cause) based upon a different paragraph of the retainer agreement. The trial court granted the motion and Duchrow recovered damages well beyond what he could have recovered under the theory originally alleged in the complaint. (*Id.* at pp. 1362–1363.)

This court reversed. Duchrow offered no reason for the delay, and the assertion of the new theory at trial prejudiced Forrest in several respects. The amendment changed the relevant facts, which warranted additional discovery and required expert testimony on attorney fee awards. Forrest had represented herself at trial, but the increase in exposure made representation by counsel more important. Duchrow's new theory of recovery also required research concerning the enforceability of the newly asserted retainer agreement provision governing withdrawal for cause. (*Duchrow, supra,* 215 Cal.App.4th at p. 1376.)

The opinion in *Duchrow* explains that three considerations generally guide the exercise of discretion in considering a motion to amend: (1) whether there is a reasonable excuse for the delay; (2) whether the change relates to the facts or only to legal theories; and (3) whether the opposing party will be prejudiced by the amendment. (See *Duchrow*, 215 Cal.App.4th at pp. 1378–1379, citing Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2012) ¶ 12:393, p. 12-79 (rev. # 1, 2011), currently available in the 2016 ed. at p. 12-88.) Each of those factors supports the trial court's decision here.

b. *Circumstances here support the decision to deny the amendment*

i. *Reason for the delay*

In moving to amend the complaint, LeMieux claimed that she had "just discovered" the different term in the July 21 Agreement. K&M argued below that LeMieux intentionally concealed the July 21 Agreement. The trial court did not make any express findings concerning LeMieux's proffered excuse that she had just discovered the July 21 Agreement.

We do not attempt to resolve the conflict in the evidence on this issue, nor is it necessary to do so. Whether or not LeMieux was actually aware of the July 21 Agreement before trial, the evidence shows that LeMieux failed to exercise reasonable diligence in prosecuting her claim.

Even considering the passage of time since LeMieux executed the July 21 Agreement, she should have been aware of its existence. The July 21 Agreement was in her possession and stored in the same safe as the July 17 Agreement on which she sued. She or someone on her behalf must have actually had the July 21 Agreement in hand when that person copied the notary stamp over the July 21 Agreement and attached that document to the July 17 Agreement.

Moreover, because of the different handwritten dates for Goldberg's signature on the July 17 Agreement and the July 21 Agreement—which were clearly visible—LeMieux and her counsel must have been aware that two different pieces of paper had been signed on two different dates. LeMieux's counsel examined Goldberg at trial about his two different signatures on the two pages of exhibit 1, suggesting to Goldberg that "this contract was signed by you on the 17th and the 21st." Exhibit 1 also showed that, in addition to the different signature dates, a key word in the compensation paragraph was different in the two pages and was visible on both. Indeed, LeMieux recognizes that there was sufficient information on the two documents to show that they were different, candidly acknowledging in her reply brief that "Trial Exhibit 1 (which is the document that *everyone*, including lawyers, possessed from the early stages of the case) clearly shows that two different agreements existed."

One would expect that LeMieux and/or her lawyers would have examined the complete versions of those two different pages at some point during the course of litigation lasting several years and involving a claim for tens of millions of dollars in damages. Whether LeMieux was aware of the difference in the July 21 Agreement prior to trial or failed to do the minimal investigation necessary to discover it, the circumstances did not suggest a "reasonable excuse for the delay." (*Duchrow*, 215 Cal.App.4th at p. 1378.)

ii. *Nature of the change*

In moving to amend the complaint, LeMieux sought to change the most critical term in the contract on which she had sued. Although only paragraph 2 of the July 17 Agreement was changed in the July 21 Agreement, that paragraph provided the basis for LeMieux's claims.

LeMieux filed suit to obtain compensation that she claimed had accrued over the years of her employment. Paragraph 2 described her compensation based upon K&M's sales. Other compensation provisions of the agreement that remained unchanged, such as her signing bonus and right to reimbursement of expenses, were not at issue. Thus, the change that LeMieux sought in the midst of trial did not simply apply a new legal theory to the same facts, but rather altered the contractual right that she asserted.

In that sense, the amendment that LeMieux sought is similar to the amendment at issue in *Duchrow*. It changed the contractual provision at issue, affecting the calculation of damages and the defenses to the plaintiff's claim. The conclusion that the change was material is supported by the trial court's

finding (which LeMieux does not contest on appeal) that the July 21 Agreement amounted to a new contract.

iii. *Prejudice*

Changing the theory of damages from the salary adjustments described in the July 17 Agreement to the monthly commissions in the July 21 Agreement required a different damage calculation. K&M was confronted with that new calculation for the first time at trial.

LeMieux's damage expert, Laura Dolan, presented alternative damage calculations for the first time at trial based upon the July 21 Agreement (exhibit 116), which she first saw the night before she testified. For both the July 17 Agreement and the July 21 Agreement, Dolan presented alternative damage numbers for two different interpretations of the compensation provision. The first alternative measured LeMieux's 3 percent of the "sales increase" for K&M by comparing current sales to K&M sales in 1992 when the agreements were executed. The second alternative measured the sales increase based upon changes from the prior year.

The first alternative resulted in a damage calculation (including interest) of $21,832,095 for the July 17 Agreement and $26,674,263 for the July 21 Agreement. The second alternative resulted in damages of $3,784,134 for the July 17 Agreement and damages of $1,790,071 or $1,393,989 for the July 21 Agreement (depending upon whether monthly sales figures were used where available).

The change in damages here was not as dramatic as it was in *Duchrow*.[5] Nevertheless, it required K&M to contend at trial with new damage numbers and a new approach to calculation.

As important, the change in the compensation term potentially affected K&M's defenses. For example, K&M pointed out in its opening statement that the July 17 Agreement compensation term called for *salary* adjustments, but the parties negotiated salary increases for LeMieux over the years without referring to the agreement. This argument might have been different in light of the commission structure in the July 21 Agreement.

In addition, Goldberg testified that his understanding of the compensation term was that LeMieux would receive a commission equal to 3 percent of the K&M sales "increase" that was attributable to LeMieux's clients. Goldberg testified that this arrangement was similar to what he understood to be the "standard" in the industry for compensating food sales

---

[5] In *Duchrow*, the damage claim increased from $44,082 to $365,044 when the complaint was amended. (*Duchrow, supra,* 215 Cal.App.4th at p. 1379.) K&M argues that the new damage calculation here actually decreased the damages dramatically, from $26,674,263 to $1,396,483. However, K&M's argument is wrong, as it is based on a faulty comparison. It compares the two damage alternatives for the July 21 Agreement (adding an amount for interest under alternative one and no interest for alternative two) rather than comparing the damages for the July 17 Agreement and the July 21 Agreement. Comparison of like alternatives for the two agreements shows that amendment of the complaint would have increased the damages by $4,842,168 under alternative one and decreased the damages by no more than $2,390,145 under alternative two.

representatives. The explicit commission-based compensation structure in the July 21 Agreement (rather than the salary adjustment provision in the July 17 Agreement) might have better supported a defense based upon this interpretation, perhaps including expert testimony concerning compensation standards in the industry. K&M attempted to cross-examine LeMieux's expert along those lines.

Whether or not K&M's defenses would ultimately have differed significantly in light of the July 21 Agreement, the fact is that LeMieux's failure to include that agreement in her complaint prior to trial deprived K&M of the opportunity to investigate those defenses. Requiring K&M to adapt and develop its defenses to the new compensation term for the first time during trial would have been unfair. Indeed, LeMieux admits that granting the motion to amend would have required a delay of the trial to permit some additional discovery.

The need for a delay itself supports the trial court's decision not to allow the amendment. As stated in *Duchrow*, " 'Where the trial date is set, the jury [has been] impaneled, counsel, the parties, the trial court, and the witnesses have blocked the time, and the only way to avoid prejudice to the opposing party is to continue the trial date to allow further discovery, refusal of leave to amend cannot be an abuse of discretion.' " (*Duchrow, supra,* 215 Cal.App.4th at pp. 1377–1378, quoting *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 488.) While there was no jury in this case, the same principle applies.

c. *The cases on which LeMieux relies do not support reversal*

LeMieux cites several cases in which courts permitted amendments to conform to proof, but none of those cases requires

reversal here. In *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, the appellate court reversed the trial court's denial of the plaintiff's motion to amend the complaint to incorporate the parties' written agreement for the sale of real property. But there, unlike here, the court concluded that all the essential terms of the agreement were part of the original complaint, and any prejudice from the amendment would have been "quite minor." (*Id.* at p. 563.) The amendment would simply have substituted the parties' written agreement in place of escrow instructions that were attached to the complaint. The escrow instructions set forth the "basic agreement with all of the essential terms." (*Id.* at p. 565.) Thus, the defendants "could not have been surprised by plaintiff's motion," and the case "could easily have continued on the merits immediately or only after a few days' continuance if one had been requested." (*Id.* at p. 564.)

Similarly, in *Born v. Castle* (1913) 22 Cal.App. 282 (*Born*), the amendment at issue would not have prejudiced the defendants. The plaintiff sued to recover a $2,000 deposit for the purchase of real property. The plaintiff canceled the sale after the San Francisco earthquake and fire had destroyed records of title. Because of a real estate agent's mistake, the plaintiff was unaware until trial that the defendants had changed the contract to shorten the time available to the plaintiff to cancel the transaction. The trial court denied the plaintiff's motion to amend the complaint to incorporate the contract that the defendants had signed. The appellate court reversed. The court concluded that "the defendants knew from the beginning of the action that plaintiff was honestly depending upon a contract not executed, and the evidence to which it is desired that the complaint shall conform was introduced by defendants, so it

cannot be said that they were surprised by the amendment, or that any injustice will result to them if it be allowed." (*Id.* at p. 286.)

Here, in contrast, the record does not show that K&M was aware of the July 21 Agreement. Introducing that contract into the case for the first time at trial would therefore have been prejudicial. Moreover, *Born* was decided before our Supreme Court's decision in *Trafton* and the decision in *Lavely* on which it relied. (See *Trafton, supra*, 69 Cal.2d at p. 31 [" 'amendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend' "], quoting *Lavely*, *supra*, 212 Cal. at p. 385.) Thus, LeMieux's reliance on *Born* for the proposition that an amendment should be granted even where it would change the factual basis for a claim is questionable.

In *Redingler v. Youle* (1958) 157 Cal.App.2d 596, the court affirmed the trial court's decision to permit an amendment, citing the principle that "[t]he question of whether an amended pleading should be allowed at the time of trial as well as what matters may be raised rest in the sound discretion of the trial court." (*Id.* at p. 602.) In addition, the appellant did not object to the amendment at trial and on appeal did not show how she had been misled. (*Id.* at pp. 599, 602.) This case therefore does not provide authority for the proposition that a trial court's decision to *deny* an amendment must be reversed where the amendment would have prejudiced the defendant.

3. *LeMieux's Summary Adjudication Argument is Moot*

LeMieux asks this court to reverse the trial court's ruling granting summary adjudication on its claims under the Labor

Code despite failing to make any argument below defending those claims. LeMieux's original complaint contained a cause of action for unpaid wages under Labor Code sections 201 and 203 and for attorney fees under section 218.5. K&M moved for summary adjudication on that cause of action on the ground that Labor Code sections 201 and 203 apply to *former* employees, and LeMieux was still employed at K&M. LeMieux failed to make any argument in opposition to this motion, and the court granted it. Despite her failure to oppose the motion below, LeMieux argues that this court should use its discretion to reverse the summary adjudication ruling on the ground that it is an erroneous decision on a legal question.

We do not reach this issue, as LeMieux's Labor Code claims were predicated on the July 17 Agreement. As the trial court ruled, the July 17 Agreement was superseded by the July 21 Agreement and did not provide a basis for LeMieux's claims. We affirm that ruling, and the trial court's decision granting the summary adjudication motion is therefore moot.

DISPOSITION

The judgment is affirmed. K&M Meat Company, Inc., is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.