Filed 11/7/17 Holmes v. Double Rock Baptist Church of Compton CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CYNTHIA HOLMES, Plaintiff and Respondent, v. DOUBLE ROCK BAPTIST CHURCH OF COMPTON, Defendant and Appellant.	B277503 (Los Angeles County Super. Ct. No. TC026065)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Affirmed in part, reversed in part and remanded.

Kinley Law Practice and Matthew L. Kinley for Defendant and Appellant.

Law Offices of Barbara A. Jackson and Barbara A. Jackson for Plaintiff and Respondent.

Cynthia Holmes (Respondent) prevailed on her claim against Double Rock Baptist Church of Compton (Double Rock) for breaching an alleged 1996 contract to pay her $500,000 upon the death of Dr. Joseph L. Holmes. In addition, Respondent prevailed on her claim against Double Rock for breaching a 2006 settlement agreement to pay Dr. Holmes $108,000 by monthly installments of $500 until the amount was paid in full. Double Rock has now appealed the judgment. It challenges the finding of liability on the alleged 1996 contract, claiming there was insufficient evidence of contract formation and consideration. As a matter of law, Double Rock is correct. The portion of the judgment pertaining to the alleged 1996 contract is reversed. In all other respects, the judgment is affirmed.

FACTS

1996 Action of Double Rock's Executive Board

On April 21, 1996, the Executive Board of Double Rock (Executive Board) signed and notarized the minutes (1996 Plan) of a meeting, which stated: "The [Executive Board] called to order a meeting that was presided by the Chairman of the Deacon Board, Herbert Lawrence. The order of business was the drafting of a financial compensation plan for our Founder and Pastor [Dr. Holmes]/or his beneficiaries ([Respondent] and/or Michael J. Holmes [(Michael)]) in the event of his death, incapacitation physically/mentally and/or retirement. [¶] A motion was made by Curtis Burries and second[ed] by Edward Dendy that in the event of the death of our Pastor [Dr. Holmes], [Double Rock] will pay to his beneficiaries ([Respondent] and/or Michael) a cash amount of five hundred thousand dollars ($500,000.00) to be paid within thirty (30) days and no more than ninety (90) days. [¶] In the event of incapacitation

physically/mentally and/or retirement, [Double Rock] shall give to [Dr. Holmes] a cash amount of five hundred thousand dollars ($500,000.00) to be paid within thirty (30) days and no more than ninety (90) days[,] and a monthly pension of five thousand dollars ($5,000.00). [¶] [Double Rock] will also continue to pay health care (Medical/Dental, etc.) benefits. Life insurance with New York Life will continue to be paid by [Double Rock] until maturity. [¶] The motion was approved and passed by the Executive Board."

The signatories to the 1996 Plan were Herbert Lawrence (Lawrence), "Chairman of the Deacon Board"; Edward Dendy, "Chairman of the Double Rock Trustee Board" (Board of Trustees); Julie Ellis, "Financial Secretary"; Curtis Burries (Burries), "Treasurer"; Willie Haynes (Haynes), "Chairman of the Building Fund"; Virginia Reed (Reed), "Member at Large"; and Charlie Josenburger, "Member at Large."

Dr. Holmes's Retirement

Dr. Holmes retired in 1998. Double Rock did not pay him $500,000. However, it began paying him $3,500 per month, and it paid $521 a month for his medical insurance as well as over $80 a month for his life insurance. He received donations during annual "Founders Day" celebrations. One year the donation was $5,000, and another year it went "up to $7,200."

Dr. Holmes and Respondent moved to Texas in 1998. He returned to California in 2000, and Respondent returned in 2001.

2006 Settlement Agreement

On February 15, 2006, the Executive Board and Dr. Holmes signed the 2006 settlement agreement, which stated: "The [Executive Board] agrees to pay [Dr. Holmes] $108,000, reported by [Dr. Holmes] to be the amount that he allowed to be withheld

from monthly retirement allotment of $5,000. [¶] It is further agreed that the $108,000 is to be paid in monthly installments of $500, effective February 26, 2006, and shall be paid on the 4th Sunday of each month thereafter until $108,000 is paid in full. [¶] It is also agreed that this shall be the final request that the Executive Board will consider from Dr. Holmes for any additional compensation, including any increase in his monthly retirement allotment. [¶] This Agreement has no bearing/effect on the retirement Agreement dated April 21, 1996."

Cessation of Payments

Double Rock stopped making payments to Dr. Holmes in April 2010. It also stopped making payments on his life insurance policy.

The Complaint

Dr. Holmes and Respondent sued Double Rock and various others for, inter alia, breach of written contract and common counts. The complaint alleged: On April 14, 1996, Dr. Holmes entered into a written agreement evidenced by the document signed by the Executive Board on that date. On February 15, 2006, Dr. Holmes entered into a settlement agreement with the Board of Trustees.[1] Double Rock breached these contracts by stopping all payments.

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[1] We note that the first amended complaint (FAC) refers to the Board of Trustees instead of the Executive Board. This is worthy of note because it raises the question of who—as a matter of Double Rock corporate governance—had the authority to enter into binding contracts. As far as we can determine, Respondent never established whether the Executive Board, the Board of Trustees, or both had authority.

Dr. Holmes's Death

Dr. Holmes died on November 23, 2012. Double Rock did not pay Respondent a $500,000 death benefit.

The FAC; Denial of Summary Judgment

The FAC reflected the death of Dr. Holmes and Respondent's appointment as special administrator for his estate. It alleged the breach of the "retirement contract" and the settlement agreement based on, inter alia, Double Rock's failure to pay Respondent $500,000 after Dr. Holmes's death, and Double's Rock's cessation of $500 monthly payments to Dr. Holmes.[2] The stated causes of action were breach of written contract, common counts, fraud, intentional interference with prospective economic advantage, negligent interference with business relationships, and negligence.

Double Rock moved for summary judgment and/or adjudication regarding Respondent's various claims. The trial court granted summary adjudication as to the torts and denied it as to breach of contract and common counts. It denied summary judgment.

Testimony Regarding the 1996 Plan

Burries and Reed testified that on April 21, 1996, Haynes presented a proposal to the Executive Board regarding Dr. Holmes's retirement. Reed testified that it was never acted on. Rather, it was a "plan of action." She also testified that "[t]his was brought to the [Executive Board] for us to review it, critique it, and it was to come back again." It never came back.

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[2] The breach of contract cause of action contained the following new allegation: "The written contract between [Dr. Holmes] and [the Executive Board] was approved by the [Board of Trustees] on April 21, 1996."

Asked why the Executive Board members signed it, she stated, "This was signed according to the notary. We signed because we were present[.]" Haynes testified that the purpose of the April 21, 1996, meeting was "to set up an agreement for Dr. Holmes for retirement and death benefits and a . . . monthly salary." According to Haynes, it was the final retirement agreement for Dr. Holmes. Lawrence testified that the 1996 Plan was the last document on the issue of Dr. Holmes's retirement plan. Dr. Holmes had no involvement in its creation. When asked what Dr. Holmes needed to do to get his retirement, Lawrence stated, "He'd been pastor for 40 years, and he was at an age where he was trying to make up his mind to retire, and [Double Rock] was trying to draw up a plan to compensate him for all the years that he had served—given leadership."

The Trial Court's November 6, 2015, Tentative Views Regarding Formation and Enforceability of a 1996 Contract

At one point during trial, the trial court said that Double Rock indicated that it would move for a nonsuit. The trial court stated that it wanted to give a "tentative view now" and said, "I think the plaintiff has established liability against Double Rock . . . on the basis of two contracts. I think they are contracts. This is the 1996 contract and then the 2006 settlement agreement." In the trial court's view, "[t]here was mutual assent. [Double Rock] consented." Next, the trial court stated, "Then [Dr. Holmes] consented by not resigning after he's got this package, but continuing in his work. The way I interpret this mutual consent, I believe, is the proposal in writing from one side and then consistent accepting conduct on the other. Common for a contract. It's just as if somebody mows my front lawn, and I go

out and look at that and say, 'That's a good job. You do that every week, I'll pay you [a] [hundred] bucks.' And the mower says nothing, but comes back the next week and mows. If I then say, 'Well, the mower just made a gift to me because she never said, "I accept your proposal,"' that would be nonsense. That would be contrary to Hornbook contract law. So in essence [Dr. Holmes] kept mowing the lawn. So there is mutual consent unquestionably. Another way to think of the same thing is this is a proposal by the board to retain an aging employee. And there was plenty of consideration."

According to the trial court, the provision requiring a payment of $500,000 upon Dr. Holmes' death was only applicable while he remained in office. Thus, the trial court said that provision was "not applicable."

The trial court interpreted the contract as requiring Double Rock to pay Dr. Holmes $500,000 when he retired, plus $5,000 a month. When defense counsel raised the statute of limitations, the trial court said, "I don't think it applies. . . . And the reason is because we have had an ongoing controversy about whether there was actually going to be payment, and it wasn't until much, much later that the board drew the line in the sand and said, 'You're cut off.'"

The Trial Court's January 28, 2016, Modification of its Tentative Views

At a subsequent hearing, the trial court accepted defense counsel's argument that the claim for a $500,000 retirement benefit was barred by the statute of limitations. However, the trial court reversed its earlier tentative view that Dr. Holmes had to be in office for the death benefit to be triggered. It said the death benefit was due within 90 days of Dr. Holmes's death.

Judgment

The trial court entered judgment in favor of Respondent on both contract claims in the amount of $863,833.33 plus interest.

This timely appeal followed.

DISCUSSION

The parties dispute the formation of a contract in 1996, the existence of consideration, and—assuming the existence of a contract—whether the trial court properly interpreted its terms. As we discuss below, there was insufficient evidence of contract formation and consideration.

I. Preliminary Comment.

None of Respondent's scattershot arguments are cogent or legally sound. We have tried to decipher and address some of them. As for any other arguments buried within Respondent's brief, they are not sufficiently developed or cognizable to warrant our consideration. Significantly, Respondent has made no attempt to defend the trial court's rationale for its findings of contract formation and consideration. Instead, Respondent seems to take the position that Double Rock waived its appeal, that the cases that it cites are "false," and that there was a contract because the parties relied on the 1996 Plan.

II. No Waiver of Appeal.

Respondent contends that there was a statement of decision, that Double Rock failed to file any objections, and it "waived [its] right to appeal the Statement of Decision that addressed the issues that it is now appealing." Also, she contends that when the trial court denied Double Rock's motion for summary adjudication regarding breach of contract and common counts, the trial court inferentially made a determination that the 1996 Plan constituted a valid contract,

and Double Rock waived its appeal by not appealing that denial order. These arguments are frivolous, and we conclude that Double Rock did not waive its appeal.

A. Statement of Decision.

Double Rock requested a statement of decision, and both parties agree that there was one. Nonetheless, the appellate record does not contain a copy of the trial court's file stamped statement of decision, or of a minute order from the trial court containing the statement of decision. Rather, Respondent submitted an appendix containing what purportedly and ostensibly is a cut-and-paste of the trial court's statement of decision. It was produced by a company called File&ServeExpress. The document does not purport to be a trial court document. In essence, Respondent is trying to incorporate the actual statement of decision by reference. But California Rules of Court, rule 8.124(b)(3)(D) prohibits the incorporation of documents by reference except for the record on appeal in another case. The bottom line is that we cannot accept the statement of decision in Respondent's appendix because it is not a trial court document, and it was not properly included in the record.

Regardless, we will assume for the sake of argument that the trial court did issue a statement of decision. In suggesting that Double Rock waived its appeal by failing to object to the statement of decision, Respondent misapprehends the pertinent law. Under Code of Civil Procedure section 634,[3] "'a party must

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[3] "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court . . . prior to entry of judgment . . . , it

raise any objection to the statement [of decision] in order to avoid an implied finding on appeal in favor of the prevailing party.' [Citation.]" (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 140.) In other words, if there is a deficient statement of decision and a corresponding objection, a reviewing court will not imply findings in favor of affirming the judgment. But if there is no objection, implied findings will be indulged. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133–1134.) Consequently, if Double Rock failed to object to any deficiencies in the purported statement of decision, the only consequence is that we would imply findings to affirm the judgment if those implied findings were otherwise supported by substantial evidence. (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462 (*SFFP*).)[4]

B. Denial of Summary Adjudication.

Respondent argues that Double Rock "had 60 days from the" order denying summary adjudication to appeal the ruling. She then argues that the trial court "clearly made a finding . . . that [the 1996 [Plan] and 2006 settlement agreement] were

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shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue." (Code Civ. Proc., § 634.)

[4] The *SFFP* court explained that the doctrine of implied findings "(1) directs the appellate court to presume that the trial court made all factual findings necessary to support the judgment so long as substantial evidence supports those findings and (2) applies unless the omissions and ambiguities in the statement of decision are brought to the attention of the superior court in a timely manner. [Citations.]" (*SFFP*, *supra,* 121 Cal.App.4th at p. 462.)

contracts and that there was one beneficiary[,] . . . [Respondent]." Next, she avers, "[Double Rock] did not file a Writ or Notice of Appeal to [the] trial court's . . . ruling that rendered a decision that there was a contract relationship between [Double Rock] and . . . [Dr. Holmes][,] and that [Respondent] was a beneficiary of the contract. [The 1996 Plan] was the only document that the parties relied on for over eleven years of payments to [Dr. Holmes]. The trial court heard . . . proof that the . . . parties relied on [the 1996 Plan and 2006 settlement agreement] as binding on each party. [Double Rock] failed to [appeal] the . . . ruling and therefore [has] waived any right [it] may have had [to challenge the trial court's ruling]. [¶] The issue going to trial was the accounting of monies owed by [Double Rock] and whether [Double Rock] [was] entitled to any offsets. The issues of whether [the 1996 Plan and 2006 settlement agreement] [were] contracts are waived."

Respondent "is under the misimpression that in an 'original motion for summary judgment' a party 'asks for the court to grant relief and' in 'the opposition papers' the opposing party 'ask[s] for the opposite relief.' However, this is not an accurate description of what a party seeks in opposing a motion for summary judgment. A party opposing a motion for summary judgment is *not* seeking affirmative relief; rather, he or she is simply seeking to prevent the other party from obtaining a judgment in his or her favor, which is the affirmative relief sought in the motion for summary judgment. In order to seek 'the opposite relief,' i.e., a judgment entered in one's own favor, a party must make its *own affirmative motion for summary judgment*, and cannot simply rely on its opposition to the opposing party's motion for summary judgment." (*Cuff v. Grossmont Union High School Dist.* (2013) 221 Cal.App.4th 582,

596.) The trial court's denial of Double Rock's motion for summary adjudication meant nothing more than that there were triable issues as to breach of contract and common counts. (Code Civ. Proc., § 437c, subds. (c), (f)(2).)

III. No Contract Formation.

"'Where the existence of a contract is at issue and the evidence is conflicting or admits of more than one inference, it is for the trier of fact to determine whether the contract actually existed. But if the material facts are certain or undisputed, the existence of a contract is a question for the court to decide.' [Citations.]" (*HM DG, Inc. v. Amini* (2013) 219 Cal.App.4th 1100, 1109.) Here, the material facts are undisputed, and our review is de novo. (*Ibid.*)

One element necessary for contract formation is mutual assent. (Civ. Code, § 1550.) "Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings. [Citation.] Mutual assent is a question of fact. [Citation.]" (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141.)

Typically, mutual assent is manifested through the process of offer and acceptance. (*Alexander v. Codemasters Group Limited, supra,* 104 Cal.App.4th at p. 141.) An offer is the manifestation of willingness to enter into a contract. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 126, p. 165.) The acceptor must have knowledge of the offer. (*Id.* at §§ 181-182, pp. 216-217.) Ordinarily, "the acceptance must be expressed or communicated by the offeree to the offeror, in order to manifest mutual assent. [Citations.]" (*Id.* at § 187, p. 221.) "The

offeree can accept by rendering performance 'only if the offer invites such an acceptance.' [Citations.]" (*Id.* at § 198, p. 232; Civ. Code, § 1584 ["Performance of the conditions of a proposal . . . is an acceptance of the proposal"].)

There is no evidence that the 1996 Plan signed by the Executive Board was communicated to Dr. Holmes and presented as an offer.[5] Moreover, there is no evidence of Dr. Holmes accepting an offer either verbally or in writing. The trial court based its contract formation finding on Dr. Holmes performing the terms of the contract, i.e., staying on as pastor. Even if the 1996 Plan required Dr. Holmes to keep working as a condition of getting his retirement package, and even if he could accept by continuing to work rather than communicating acceptance, there was no evidence that Dr. Holmes was aware of the offer when he kept working as a pastor. In any event, the 1996 Plan did not require Dr. Holmes to continue working.[6] As Lawrence testified,

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[5] Even if it could be construed as an offer, it is unclear whether any resulting contract would have been binding. Contract formation requires parties capable of contracting. (Civ. Code, § 1565.) We are not aware of any evidence that the Executive Board had the power to enter into a contract.

[6] Without explanation, the trial court concluded that the 1996 Plan was designed to retain an aging employee. There was no evidence to support this finding. Nor did the facts support a reasonable inference that the Executive Board's intent was to give Dr. Holmes an incentive to stay. Based on the terms of the 1996 Plan, he had every incentive to leave because, if Double Rock had honored its internal decision to give Dr. Holmes a gift for his past service, Dr. Holmes would have immediately received a $500,000 payment plus $5,000 a month.

the retirement plan was designed to compensate Dr. Holmes for past service. Thus, as a matter of law, Dr. Holmes continued work as pastor until 1998 cannot constitute acceptance based on performance.

Undoubtedly, Respondent would point to the reference in the 2006 settlement agreement to "the retirement Agreement dated April 21, 1996" as an admission that there was a contract. Respondent, however, has not cited any law suggesting that by characterizing a document as a contract that a party can convert that document into a contract in the absence of mutual assent. The larger hurdle for Respondent is that the reference does not establish what the signatories to the 2006 settlement agreement meant by "the retirement Agreement dated April 21, 1996." Maybe they thought it was a contract, or maybe they thought it was simply—as the evidence establishes—the Executive Board's agreement to give Dr. Holmes a gift.

Certainly Dr. Holmes became aware of the 1996 Plan at some point in time. Otherwise, he would not have questioned the payments he was receiving and forced the 2006 settlement agreement. But the record does not establish when he learned about the 1996 Plan, that the document was communicated to him as an offer, and that he manifested acceptance.

In her Respondent's brief, Respondent offers only one sentence of argument on the mutual assent issue. She states, "[Dr. Holmes's] conduct of retiring and rec[e]iving his pension from [Double Rock] for eleven years is evidence that he relied on the agreement and that there was mutual consent because [he] was paid by [Double Rock]." This sentence lacks traction. The act of retiring and receiving a pension does not constitute acceptance by performance because the 1996 Plan did not require

Dr. Holmes to retire, i.e., the 1996 Plan contemplated that he might die in office, in which case a death benefit would be paid.

Four unmistakable things are revealed in Respondent's brief.

First, she believes that a written contract is formed by the simple act of one party writing terms on a piece of paper and signing it. She does not believe that there has to be an offer and acceptance. Moreover, it appears that she believes that the testimony of Executive Board members that there was an agreement means there was substantial evidence of a contract between Double Rock and Dr. Holmes as opposed to merely an agreement by the Executive Board to give Dr. Holmes a gift. Respondent's beliefs are misplaced. California, as we have already indicated, does not recognize a contract in the absence of mutual assent. (Civ. Code, § 1550.) And mutual assent—which requires an offer and acceptance—is not established by testimony that there was some sort of Executive Board agreement.

Second, Respondent believes Double Rock had the burden of proving there was no contract. Indeed, she states, "[Double Rock] failed to present a defense at trial [as to] . . . breach of the contracts," and "did not call any witnesses or present any documentary evidence to the trial court to establish that there was no mutual consent and no consideration." The law undermines the suggestion that we should affirm on the theory that Double Rock failed to meet its burden of proving there was no contract. It is set in legal stone that "the plaintiff normally bears the burden of proof to establish the elements of his or her cause of action. [Citation.]" (*Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 234; *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 654 ["Whatever plaintiff

is obligated to plead, plaintiff is obligated to prove"]; Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief . . . that he [or she] is asserting"]; Evid. Code, § 520 ["The party claiming that a person is guilty of . . . wrongdoing has the burden of proof on that issue"].) In contrast, a defendant "bears the burden of proof on new matter and affirmative defenses. [Citation.]" (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668.) Because contract formation was an element of Respondent's breach of contract claim (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388), she was obligated to prove it.

To provide some additional depth to our discussion, we highlight the following. "The defendant does not have the burden of proof on an allegation that, though affirmative in form, is in essence a denial. [Citation.] [¶] Where allegations of a complaint are denied, the plaintiff must produce evidence to establish a prima facie case; in the absence of that evidence, judgment for the plaintiff cannot be based on adverse inferences from the defendant's failure to appear in court[,]" or simple failure to produce evidence. (1 Witkin, Cal. Evidence (5th ed. 2012) Burden of Proof & Presumptions, § 8, pp. 178-179.) A defendant bears the burden of proof on defenses that go beyond a mere denial of the elements of a plaintiff's cause of action. For example, a defendant bears the burden of proof regarding the statute of limitations. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 8–9.) There are exceptions to the foregoing rules of thumb, and sometimes the burden of proof is altered. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 25; *In re Marriage of*

Prentis-Margulis & Margulis (2011) 198 Cal.App.4th 1252, 1253 ["Courts may alter the normal allocation of the burden of proof based on considerations of fairness and policy"].) But Respondent has not identified any exceptions to the general rules that would aid her cause.

To support her burden of proof theory, Respondent cites Evidence Code section 110, which defines that meaning of "'burden of producing evidence.'" She avers that Double Rock "failed to meet [its] burden and treated the trial as if it was a [m]otion for [s]ummary [j]udgment. [Double Rock] submitted written declarations to the [trial court] of each of the adverse witnesses [Burries], [Reed] and prior declarations of Deirdre Burr-Williams. When the trial court asked the [d]efense [if it planned] to call any witnesses[,] the [d]efense stated no, and informed the [trial] court that it will submit on the declarations of party witnesses and not call any witnesses[,] including the [d]efense expert witness." The problem is with the premise. Though she suggests Evidence Code section 110 establishes the burden of proof, that is not true. It is a definition, nothing more. The burden of proof is set forth specifically in Evidence Code sections 500 and 520.

Moving to a new statute, Respondent cites Evidence Code section 550, which provides, "(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on the fact would be required in the absence of further evidence. [¶] (b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact." Why she cites this statute is unclear. As we have explained, there was no evidence of contract formation offered by

Respondent. Thus, the burden of proof never shifted to Double Rock.[7]

Third, Respondent refers to the parties relying on the 1996 Plan. We are unclear why Respondent thinks this is relevant to contract formation. In our view, it is not. Reliance in this context seems relevant only to promissory estoppel, a theory that was not advanced or decided at trial. Further, the evidence does not support promissory estoppel, a doctrine which allows a court to use equity to enforce a promise given without consideration if the following elements are satisfied: "(1) a clear promise, (2) reliance, (3) substantial detriment, and (4) damages 'measured by the extent of the obligation assumed and not performed.' [Citation.]" (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692.) Here, there was no evidence that Dr. Holmes relied on the 1996 Plan.[8] Nor is there evidence that

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[7] Despite suggesting that Double Rock had the burden of proof, Respondent does say the following: "[Respondent] met her burden in producing evidence which showed the trier of fact that [Dr. Holmes] worked as the founding pastor of [Double Rock] for 40 years. That before he retired in [*sic*] notified the Executive Board[.] The Executive Board independent of his involvement formed a committee and created [a] retirement compensation [plan] dated April 21, 1996. [Dr. Holmes] consented to the retirement package and retired in reliance on the document. [Citation.] [Double Rock] did not produce any other document at trial." Respondent provided no evidentiary citations to support these assertions of fact, and she did not otherwise point to evidence that there was an offer and acceptance.

[8] While Respondent states in her brief that Dr. Holmes "retired in reliance on the" the 1996 Plan, she provided no record citations to back up her assertion.

he suffered detriment as a result—evidence that he would not have retired, and he would have received more money and benefits by continuing to work than he did in retirement.

On this third point, we acknowledge that Respondent cites Evidence Code section 623, which provides: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." Respondent then states that she presented years of business records that established payments by Double Rock. We fail to appreciate the point. She cited no law establishing that this statute pertains in any way to the issue of contract formation, and she has not offered evidence of reliance.

Fourth, Respondent misunderstands the impact of the evidence. She cites the testimony of Lawrence and Haynes regarding contract formation, but neither provided evidence of an offer and acceptance. Without citation to the record, Respondent informs us that Burries submitted a declaration stating that retirement payments were gifts, but then testified that they were obligations. Even if he said they were obligations, that does not mean they were obligations arising from a contract with Dr. Holmes. Burries could have been referring to a moral obligation, or to the obligation of Double Rock to follow a plan confirmed by the Executive Board. Either such obligation would not support Respondent's claim for breach of contract.

IV. No Consideration.

A contract requires consideration. (Civ. Code, § 1550.) Good consideration for a promise is any benefit conferred, or agreed to be conferred, upon the promisor. (Civ. Code, § 1565.)

The 1996 Plan did not seek bargained consideration from Dr. Holmes. The reason is made plain by Lawrence's testimony. The 1996 Plan was signed by the Executive Board to reward Dr. Holmes for his past service. His past service was insufficient to support a contract. (*Leonard v. Gallagher* (1965) 235 Cal.App.2d 362, 373 ["past consideration will not support a promise which is in excess of the promisor's existing . . . duty"].) More particularly, a promise to pay for past services is "simply a promise to make a gift." (*Dow v. River Farms Co.* (1952) 110 Cal.App.2d 403, 408.) Our Supreme Court long ago explained that a "'pension is a gratuity . . . where it is granted for services previously rendered which at the time they were rendered gave rise to no legal obligation[.]'" (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 851–852 (*Kern*).) This statement of law in *Kern* applies.

In her brief, Respondent makes no argument regarding consideration other than to say that the cases cited by Double Rock are "false." She makes no attempt to defend the trial court's view that there was consideration because Dr. Holmes kept working until 1998. If she did try to defend this view, it would be unavailing. The 1996 Plan did not condition Dr. Holmes's beneficiaries' receipt of a death benefit on him continuing to work.

DISPOSITION

The portion of the judgment pertaining to the alleged 1996 contract is reversed. In all other respects, the judgment is affirmed. On remand, the trial court shall modify the judgment to reflect that Double Rock prevailed on the claim pertaining to breach of the alleged 1996 contract, and that Respondent prevailed on the claim pertaining to breach of the 2006 settlement agreement.

Double Rock shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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