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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DAVID MICHAEL ZAVATTO, Plaintiff and Appellant, v. AGNES ITZHAKI, Defendant and Respondent.	B270579 (Los Angeles County Super. Ct. No. NC060161)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ross M. Klein, Judge. Affirmed in part and reversed in part.

Law Office of Drew Petersen and Gordon Andrew Petersen for Plaintiff and Appellant.

Law Offices of Howard S. Fisher and Howard S. Fisher for Defendant and Respondent.

Plaintiff David Zavatto appeals from a judgment of dismissal following the sustaining of a demurrer without leave to amend in favor of defendant Agnes Itzhaki. Zavatto's company, Zavatto Brothers Construction (ZBC), performed remodeling work on Itzhaki's residential property. After Itzhaki refused to pay for part of the work, Zavatto sued for breach of contract, common count, and violation of Civil Code section 8800.[1] The trial court sustained Itzhaki's demurrer to the first amended complaint (FAC) without leave to amend, and Zavatto appealed. We reverse the judgment as to the common count. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As this appeal challenges the trial court's order sustaining a demurrer, we draw the relevant facts from the complaint. (*Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1031.) Zavatto is the sole proprietor of ZBC which performs residential remodeling work. Itzhaki is a professional real estate investor and licensed real estate agent. Zavatto's brother, Don Zavatto (Don), is an architect.

On February 10, 2014, Zavatto met with Don, Itzhaki, and Itzhaki's counsel to discuss a remodeling project. Zavatto and Don proposed that Itzhaki purchase an investment property that Zavatto and Don would remodel for sale. On February 20, 2014, Zavatto gave Itzhaki a proposed contract: a blank form titled "Home Improvement Contract" (HIC). The following day, Zavatto emailed Itzhaki a "contract addendum" for her review.

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[1] Civil Code section 8800 regulates the duties of a private property owner as to progress payments on a construction contract.

The addendum provided that "Itzhaki (Owner) and [ZBC] (Contractor), HEREBY ENTER into the following Contract for Work to be performed on behalf of Owner by Contractor at the Work Site identified in this agreement. . . . Contractor shall provide and furnish all labor, materials, tools, supplies, equipment, services, supervision, and administration necessary for the proper and complete performance and acceptance of the following portions of the Work for the Work Site: Complete remodel of property per LA City approved (stamped) plans by Zavatto Design Group and cost breakdown attached." No documents were attached to the addendum. The addendum further stated "Owner shall pay Contractor for expenses incurred on project for direct labor, material and subcontracted work plus a 10[percent] fee. . . . On sale of property, Owner shall pay Contractor a sum equal to 15[percent] of the net proceeds from the sale."

On February 23, 2014, Itzhaki proposed a meeting with Zavatto to "go over the contract together." On February 24, 2014, they met and Itzhaki "presented her comments and updates to the [] Addendum." She said she had not reviewed the documents with her attorney yet. On February 25, 2014, Zavatto emailed Itzhaki a copy of the addendum with most of her comments incorporated. He further informed her that "demo" would start the next day and there would be eight "workers on the job."

"Work began on the project" in late February. On March 5, 2014, Itzhaki paid Zavatto's first invoice although no agreement had been signed. On March 10, 2014, Don met with Itzhaki and her counsel. They discussed the addendum. "There were no agreements reached at this meeting and this was the last time the contract was discussed until February 2015." Work on the

project was "substantially completed" in November 2014. In January 2015, Zavatto submitted the "final bill for work" in the amount of $34,241.20 to Itzhaki.

Itzhaki did not pay Zavatto's final invoice. In February 2015, Itzhaki told Zavatto she also would not pay him 15 percent of the profits from the sale of the property. The property sold on July 17, 2015. On July 28, 2015, Zavatto mailed a letter to Itzhaki demanding payment of 15 percent of the profits of the sale which he calculated to equal $65,219. Itzhaki has not paid Zavatto the $65,219 demanded.

On July 9, 2015, Zavatto filed this action against Itzhaki. On August 27, 2015, he filed the FAC for breach of written contract, common count, and violation of Civil Code section 8800. He attached the blank form HIC and the addendum. Neither document was signed. He alleged he was doing business under the fictitious name ZBC.

Itzhaki filed a general demurrer to the FAC. The trial court sustained the demurrer without leave to amend as follows: "Plaintiff appends to the [FAC] a copy of the contract. What is appended is a blank, unsigned form contract with none of the terms included. Although the absence of signatures is not necessarily fatal at the pleading stage, the fact that no terms are stated is a serious defect. The 'addendum,' which is also unsigned, has the terms set forth, but it is not a contract in itself—it is an addendum to the contract without any terms. The same deficiency defeats the common counts claim . . . Because there is no viable contract pled, th[e] Cause of Action [for violation of Civil Code section 8800] must also fail." Judgment was entered on December 30, 2015. Zavatto timely appealed.

DISCUSSION

1. *Standard of Review*

"On appeal from an order dismissing a complaint after the sustaining of a demurrer, we review the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. [Citation.] We give the complaint a reasonable interpretation, 'treat[ing] the demurrer as admitting all material facts properly pleaded,' but do not 'assume the truth of contentions, deductions or conclusions of law.' [Citation.] We liberally construe the pleading with a view to substantial justice between the parties." (*Staniforth v. Judges' Retirement System* (2016) 245 Cal.App.4th 1442, 1449.)

2. *Contract-Based Causes of Action*

The FAC alleged that (1) the parties entered into a written agreement on February 24, 2014, (2) Itzhaki breached the agreement by not paying Zavatto's "final bill for work completed" or "15[percent] of [the] net proceeds from the sale," (3) Zavatto performed his obligations under the agreement, and (4) he suffered damages in the amount of $99,460.20 comprised of $34,241.20 for work performed and $65,219 for his share of the sale proceeds. The blank form HIC and addendum were attached.

Zavatto contends the FAC adequately stated a cause of action for breach of contract. In particular, he argues the terms of the contract were adequately alleged because the FAC attached copies of the HIC and addendum.

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West*

Realty, LLC v. Goldman (2011) 51 Cal.4th 811, 821.) " 'In order for acceptance of a proposal to result in the formation of a contract, the proposal "must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain." [Citation.] A proposal " 'cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. [¶] . . . The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.' " [Citation.]' " (*Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724, 734.)

Here, Zavatto contends the material terms of the contract were set forth in the attached HIC and addendum. However, neither document described what kind of remodeling work ZBC was to perform on the property. While the addendum referred to attached "plans" for the "complete remodel" of the property, no plans were attached. As neither document specified the scope of the work to be performed on the property or even the *kind* of work beyond that it involved "remodel[ing]," the terms of the contract were not sufficiently definite. In other words, there is no basis for determining the existence of a breach given that the alleged contract does not establish whether the work Zavatto performed and for which he seeks compensation was contemplated under the parties' agreement. Accordingly, the FAC did not adequately allege the existence of a valid written contract between the parties.

Zavatto acknowledges the cause of action for violation of Civil Code section 8800 is also based on the existence of a valid contract. As no contract was adequately alleged, the trial court

did not err in sustaining the demurrer to this cause of action as well.

3. *Common Count*

a. *Indebted for Work and Labor Performed*

Zavatto contends the FAC adequately pled a common count for work performed on the property. The FAC alleged that Itzhaki was indebted to Zavatto for "work, labor, services and materials rendered" and has not paid him.

"A common count is not a specific cause of action . . . rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 (*McBride*).) "In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. [Citation.] The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' [Citation.]" (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 (*Zerin*).)

Here, the FAC adequately pled a common count based by alleging (1) Itzhaki's indebtedness, (2) consideration in the form of Zavatto's "work, labor, services and material rendered," and (3) nonpayment. Itzhaki acknowledges the general rule that a common count is not demurrable. However, she argues that because the common count seeks the same relief as the breach of contract cause of action, it falls within an exception to that rule. In support of this argument, she cites to *McBride, supra,* 123 Cal.App.4th 379 for the holding that "[w]hen a common count is used as an alternative way of seeking the same recovery

demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*Id.* at p. 394.)

McBride is distinguishable. In *McBride*, a mother told her boyfriend he was the father of her daughter. (*McBride*, *supra*, 123 Cal.App.4th at p. 382.) In reliance on this representation, the man supported the daughter and mother. (*Id.* at p. 383.) He later discovered the daughter was not his biological offspring and sued the mother and the child's biological father for restitution of his payments for the child and mother's care and support. (*Id.* at p. 385.) The trial court sustained the defendants' demurrer without leave to amend on the ground the claims were precluded by public policy. (*Ibid.*) The Court of Appeal affirmed and held the common count was demurrable because it was based on the same facts and sought the same recovery as the restitution claim. (*Id.* at p. 394.)

In *McBride*, the court's conclusion that public policy precluded recovery of sums paid for a child's support applied equally to the restitution claim and common count. Here, the reason the breach of contract cause of action fails—the allegations do not show the existence of a contract—does not dispose of the common count. The lack of an express contract here is not fatal to the common count which can proceed based on nonperformance of an implied contract or quasi-contractual obligation. (See *Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 793 ["That the facts may also be substantially similar to those in the [other] count, which does not state a cause of action, will not defeat the common count unless it clearly appears to be based upon the insufficient, rather than the sufficient, specific allegations."].)

Accordingly, we conclude the court erred in sustaining the demurrer as to the common count.

b. *Indebted for Money Had and Received*

Zavatto also argues the FAC adequately pled a common count for money had and received based on allegations that Itzhaki sold the property and did not pay him 15 percent of the proceeds as agreed upon. However, the FAC does not attempt to allege a common count under this theory—the FAC did not allege that Itzhaki was indebted to him "for money had and received" but only alleged that Itzhaki was indebted to him "for work, labor, services and materials rendered."

"Leave to amend must be granted if 'there is a reasonable possibility that the defect can be cured by amendment.' [Citation.]" (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 69.) However, here, Zavatto has not shown he could amend to allege a common count under this theory.

"A cause of action for money had and received is stated if it is alleged [that] the defendant 'is indebted to the plaintiff in a certain sum "for money had and received by the defendant *for the use of the plaintiff*." ' [Citation.]" (*Zerin*, *supra*, 53 Cal.App.4th at p. 460 (italics added).)

Here, Zavatto argues he can allege he was due $65,219 based on the parties' written contract, in particular, Itzhaki's promise to pay Zavatto 15 percent of the profit from the sale of the property. However, this does not amount to an allegation that Itzhaki received money "for the use of" Zavatto. (*Zerin*, *supra*, 53 Cal.App.4th at p. 460.) Rather, Zavatto's claim is that Itzhaki sold the property, received money from the sale, and pursuant to the parties' written contract, owed Zavatto a portion of that money. There is no allegation that the buyer of the

property paid Itzhaki money "for the use of" Zavatto. Rather, it is clear the buyer paid the purchase price of the property because it was due to Itzhaki. Accordingly, to the extent we have power to grant Zavatto leave to amend the FAC to allege a new common count based on the theory of money had and received, we decline to do so. (Code Civ. Proc., § 472c, subd. (a).)

4. *Promissory Estoppel*

Zavatto argues the FAC adequately stated a claim for promissory estoppel based on allegations that (1) Itzhaki promised to pay Zavatto for his costs, labor and materials plus ten percent as well as 15 percent of her profit from the sale, (2) Zavatto reasonably relied on that promise by performing work on the property, and (3) Zavatto suffered damages.

Although the FAC did not allege a cause of action for promissory estoppel, "[a] demurrer should not be sustained without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect in the complaint can be cured by amendment. [Citation.]" (*Frost v. Geernaert* (1988) 200 Cal.App.3d 1104, 1107.) Accordingly, we will evaluate whether, under the facts alleged, the FAC could state a cause of action for promissory estoppel.

" ' "The elements of a promissory estoppel claim are '(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.' " ' [Citation.]" (*Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 225.) " 'To be enforceable, a promise need only be " 'definite enough that a court can determine the scope of the duty[,] and the limits of

performance must be sufficiently defined to provide a rational basis for the assessment of damages.' " . . . It is only where " 'a supposed "contract" does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, [that] there is no contract.' " ' [Citation.]" (*Id.* at p. 226.)

Here, Itzhaki's promise to pay for the "[c]omplete remodel of property" as provided by the addendum is not clear and unambiguous in its terms. It does not provide what kind of work Itzhaki agreed to pay for, beyond that it involved remodeling. Accordingly, the promise is too nebulous to allow the court to determine the scope of Itzhaki's duty and cannot provide the basis for a promissory estoppel claim.

5. *Leave to Amend*

Zavatto argues he should be granted leave to amend to allege causes of action for breach of oral contract and open book account. " 'While it is the plaintiff's burden to show "that the trial court abused its discretion" and "show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading" [citation], a plaintiff can make "such a showing . . . for the first time to the reviewing court" [citation].' " (*Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064, 1072.)

With respect to the breach of oral contract cause of action, Zavatto contends he can amend the FAC to allege he "entered into an oral agreement whereby [Itzhaki] agreed to pay all material costs, labor, and expenses Zavatto incurred for approved and necessary work, repairs, and remodeling to the Property, plus 10 [percent], within 10 days of [Zavatto's] billing.

Furthermore, [Itzhaki] agreed to further compensate [Zavatto] by providing [him] with fifteen percent (15[percent]) of the Property's sale price when [she] sold the Property. In exchange for [Itzhaki's] promises, Zavatto agreed to perform all reasonably necessary and requested improvements to the Property, in a timely and workmanlike manner . . . ."

These allegations do not cure the defects in the cause of action for breach of written contract—the alleged agreement still does not specify what kind of remodeling work Zavatto would perform or the scope of such work. Because certain material terms of the oral contract are not alleged, the proposed amendments fail to adequately allege the existence of a contract.

With respect to the proposed cause of action for account stated, Zavatto contends he can attach "the history of billing statements, invoices, and accounting ledgers over the ten months he performed work at the Property" that would show Itzhaki's indebtedness to him for work performed on the property.

"To constitute an account stated, it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and *agreed* to be the correct sum owing from the debtor to the creditor, and that *the debtor expressly or impliedly promised to pay* to the creditor the amount thus determined to be owing. In addition, the amount agreed upon must be either specifically stated or readily calculable. [Citation.]" (*H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp.* (1979) 99 Cal.App.3d 711, 726.)

Here, Zavatto does not contend that he can allege facts showing Itzhaki *agreed* to a specific sum for the work he performed, rather than invoices that simply show services were

rendered and Zavatto expected payment in an amount due. Therefore, he has not shown he can adequately state a cause of action for account stated such that leave to amend should be granted.

DISPOSITION

The order sustaining the demurrer is reversed as to the common count. The order is affirmed in all other respects. In light of the mixed results here, the parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

SORTINO, J.*

WE CONCUR:

BIGELOW, P. J.

FLIER, 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.