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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GOLD FOREVER MUSIC, INC. et al.,

Plaintiffs, Cross-defendants and Respondents,

v.

STRUCTURED ASSET SALES, LLC et al.,

Defendants, Cross-complainants and Appellants;

DAVID PULLMAN,

Defendant and Appellant;

THE PULLMAN GROUP, LLC,

Cross-complainant and Appellant.

B221921

(Los Angeles County Super. Ct. No. BC387015)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Affirmed.

Manatt, Phelps & Phillips, Barry E. Mallen, Benjamin G. Shatz; Law Offices of Robert S. Besser and Robert S. Besser for Defendants, Cross-complainants and Appellants.

Buehler & Kassabian, George W. Buehler and Mark M. Kassabian for Plaintiffs, Cross-defendants and Respondents.

INTRODUCTION

Appellants Structured Asset Sales, LLC, Wertheim, LLC, David Pullman, and The Pullman Group, LLC[1] appeal from the judgment entered after the trial court granted summary adjudication motions in favor of respondents Gold Forever Music, Inc. and Edward J. Holland, Jr. We affirm the judgment.[2]

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1 Although the notice of appeal lists only Structured Asset Sales, LLC, we liberally construe it to include all defendants and cross-complainants. (*Beltram v. Appellate Department* (1977) 66 Cal.App.3d 711, 715-716; see, e.g., *Chung Sing v. Southern Pacific Co.* (1918) 178 Cal. 261, 263-264.)

2 Appellants also purport to appeal from an order denying their motion for new trial. The order is not appealable; any issues regarding the denial of the new trial motion are reviewed on appeal from the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19; *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 415.) Appellants state that they only included the order in their notice of appeal to make it clear that the appeal encompassed the order. Accordingly, we construe the notice of appeal as encompassing the order denying a new trial rather than as an appeal from that order. (See *Walker*, *supra*, at pp. 20-21.)

FACTS

A. *Introduction*

This lawsuit concerns the right to royalties for the performance of songs composed by Ronald Dunbar (Dunbar).[3] Respondents claim a right to the royalties under a 1976 agreement with Dunbar. Appellants claim that Dunbar assigned the right to them in 2004.

B. *Royalty Agreements in the Music Industry*

In general, the owner of the copyright on a piece of music licenses the use of that music, for example, in sheet music, recordings, or for use in film or television. The licensee pays the copyright owner. The owner of the copyright, if not the songwriter, will then pay a percentage of the license fee to the songwriter as a royalty. Such royalties are often called "writer's royalties" or "mechanical royalties."

If the music is performed publicly, the copyright owner is entitled to a royalty for the use of the music. Such royalties are commonly called "performance royalties." Performance royalties are collected by performing rights societies, which then pay them to the persons entitled to payment. Usually, by contract, half of the performance royalty is paid to the music publisher and half to the songwriter.

C. *The 1968 and 1974 Music Publishing Agreements*

Respondent Edward J. Holland, Jr. (Holland) is a songwriter who, along with his brother, Brian Holland, and Lamont Dozier wrote many songs which were recorded and released on the Motown label in the 1960's. Holland formed respondent Gold Forever Music, Inc. (Gold Forever) in order to be an independent music publisher. Holland is the sole shareholder of Gold Forever.

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3 Dunbar is not a party to this lawsuit.

Holland had worked with Dunbar since the early 1960's. Dunbar wanted to be a songwriter. In July 1968, Gold Forever entered into a music publishing agreement with Dunbar. The agreement provided that Dunbar gave Gold Forever the rights to all of his musical compositions, including the right to copyright those compositions. It further provided that "[i]n full consideration of the writer entering this agreement and transferring all rights in the composition," Gold Forever would pay Dunbar royalties in specified amounts.

The 1968 agreement also provided: "Publisher shall not be required to pay royalties earned by reason of the public performance of the musical composition; said royalties being payable only by the performing right society with which Writer is or may in the future become affiliated." The agreement further provided: "No moneys due or to become due to Writer shall be assignable . . . without prior written consent of Publisher. If any assignment of such moneys is made by Writer without such prior written consent, no rights of any kind against Publisher will be acquired by the assignee . . . ."

Holland worked with Dunbar to help Dunbar become a successful songwriter. Gold Forever copyrighted Dunbar's songs.

The 1968 agreement was extended several times. In April 1974, Gold Forever and Dunbar entered into a new music publishing agreement. The provisions of the 1974 agreement were substantially the same as those of the 1968 agreement. The term of the agreement was four years, with Dunbar granting Gold Forever options to extend the agreement for three one-year periods.

Both Dunbar and Gold Forever were affiliated with the performing right society Broadcast Music, Inc. (BMI). Gold Forever received the music publisher's half of the performance royalties for Dunbar's compositions on which it held the copyrights.

D. ***The 1976 Release and Termination Agreement***

In 1976, Dunbar asked Holland if he could be released from the 1974 music publishing agreement. By agreeing to release Dunbar, Gold Forever would be giving up much of the future revenue from the 1974 agreement. In general, license revenue and performance royalties peaked and then diminished to almost nothing within a year of the release of a recording of one of Dunbar's compositions. Holland did not expect much future revenue from the songs Dunbar previously had written for Gold Forever.

Holland and Dunbar agreed on the terms under which Holland would release Dunbar from the 1974 agreement. Gold Forever would retain ownership of the copyrights of the songs it had published. Additionally, Holland and Dunbar agreed on a list of songs to which Dunbar would assign Holland his rights as songwriter (assigned songs). These were songs which Holland had helped Dunbar to write, but for which Holland had taken no credit as songwriter. Holland would acquire the right to performance royalties for the assigned songs. Neither he nor Gold Forever would have the right to the writer's share of performance royalties for the remainder of the songs subject to the 1968 and 1974 agreements, except to the extent those royalties offset money Dunbar owed to Gold Forever. Holland paid Dunbar $5,000 in conjunction with their agreement, even though he did not believe that Gold Forever would earn that much in royalties from Dunbar's songs.

On January 26, 1976, Dunbar signed an "Outright Assignment of All Author's or Co-Author's Rights Including Any Such Interest in Copyrights" of all his rights in the assigned songs. Dunbar assigned to Holland, "and his legal representatives and assigns forever, all of his right, title and interest of every kind, nature or description in and to the musical compositions (music and/or arrangements, lyrics, etc.) entitled (see Exhibit 'A' attached hereto and incorporated herein by this reference) . . . , the music which was composed in whole or in part by the undersigned Ronald Dunbar and/or the lyrics (words), arrangements, etc., of which were written in part or in whole by the undersigned Ronald Dunbar, together with" the existing copyrights to the assigned songs and the right to renew the copyrights.[4]

The release and termination agreement, which Dunbar signed in February 1976, released Dunbar from the 1974 agreement and released Gold Forever from any liability

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4 Holland later assigned his rights in the assigned songs to Gold Forever.

under that agreement. Dunbar acknowledged that Gold Forever "accounted and paid to you any and all sums due, if any, including royalties, compensation or other monies or you relinquish any and all rights to any royalties or compensation in respect to any of the masters or recordings or musical compositions" subject to the songwriting agreements. He also acknowledged that his obligations to Gold Forever under the 1974 agreement survived except his "obligations to render personal services under" the agreement. The release extended to the parties' successors and assigns.

Holland recorded the 1976 outright assignment with the United States Copyright Office. He also sent a copy to BMI, but BMI advised him that it did not recognize such assignments. Holland told Dunbar about this and advised him that he would be obligated to pay the performance royalties for the assigned songs. Holland did not press Dunbar for payment, however. When they again discussed the matter, Dunbar acknowledged his obligation but said he needed the money to live on. Holland arranged for the writer's royalties due to Dunbar for the songs other than the assigned songs to be offset against the performance royalties owed to Holland on the assigned songs.

Holland and Dunbar maintained a good relationship, and in 1998 Dunbar went to work for Holland. Dunbar acknowledged that the performance royalties he owed Holland exceed the writer's royalties due him from Gold Forever, and he never requested payment of the writer's royalties. Gold Forever provided Dunbar with royalty statements and a statement of his account in December 2006; Dunbar never challenged the statements.

E. *Dunbar's Subsequent Assignment of His Rights to Royalties*

Beginning in April 2004, Dunbar signed a series of documents purporting to assign his rights to various songs to appellants. On April 4, 2004, Dunbar assigned to Structured Asset Sales, LLC (SAS) all of his rights "in and to the writer's share of performance income or payments of any kind" due from BMI for performance of 34 listed songs. The listed songs included some of the assigned songs. Dunbar granted to

David Pullman (Pullman) "full power of attorney" to do what was necessary "for the purpose of insuring that SAS continues to receive the Assigned Income."

Pullman, on behalf of The Pullman Group, LLC, and Dunbar signed an agreement for the assignment of Dunbar's BMI performance rights at the beginning of May 2004. The purchase price for the rights was $103,333.33. At the time, Pullman was unaware of the agreements between Dunbar and Holland and Gold Forever.

On May 4, 2004, Dunbar signed a BMI Royalty Assignment Verification Form, verifying the assignment of his royalties to SAS.

On January 26, 2006, Dunbar executed a second assignment to SAS of his rights to the listed songs: "(i) all of Dunbar's right, title and interest in and to the copyrights of the Compositions listed on Exhibit 'A' hereto [the same list as in the April 4 assignment] . . . ; (ii) all of Dunbar's right, title and interest, in and to the publisher's share and co-publisher's share and the writer's share of income or payments of any kind, including performance income, mechanical license income, synchronization license income, printed music royalty income, bonuses and one time payments, and all other payments . . . by any performance or mechanical rights society anywhere in the world and any society worldwide and Edward Holland, Brian Holland, Gold Forever Music, Inc. and any Holland related company from or related to the exploitation of existing musical compositions written in whole or in part by Dunbar and copyrights thereto and derivatives thereof . . . ."

This assignment also provided Dunbar would not "terminate, modify or amend any agreements or contracts" with Holland or Gold Forever "that would affect the right of SAS to receive the Assigned Income." Dunbar granted to Pullman "full power of attorney" to do what was necessary "for the purpose of insuring that SAS continues to receive the Assigned Income and/or is able to pursue the rights and claims assigned hereby." Finally, it provided that Holland, Gold Forever and BMI "are hereby directed to make payment of all assigned payments and income that otherwise would be due or payable to Dunbar, from and after April 29, 2004, no matter when earned," to SAS.

On March 29, 2006, Dunbar executed an assignment to Wertheim, LLC (Wertheim) of the rights to the listed songs. The provisions of the assignment were the same as those in the January 26, 2006 assignment to SAS.

F. *The Federal Litigation*

Wertheim filed a complaint against Gold Forever and Holland in federal district court. (*Wertheim v. Gold Forever et al.* (C.D. Cal., CV 06-6184).) It alleged causes of action for rescission, breach of contract, fraud, unfair business practices, misappropriation and conversion, and declaratory relief. Wertheim alleged Gold Forever and Holland wrongfully deprived Dunbar and Wertheim of their rightful share of the income from Dunbar's songs.

Gold Forever and Holland answered and asserted a number of affirmative defenses, including that Dunbar had no interest in the assigned songs to transfer to Wertheim in 2004. Gold Forever and Holland also filed counterclaims, seeking a declaratory judgment as to their right to royalties to the assigned songs and an order that the royalties be paid to them.

On February 5, 2008, the court dismissed the counterclaims on the ground the 1976 outright assignment did not include Dunbar's performance royalty rights. On March 14, 2008, the court dismissed the entire litigation because the first amended complaint included only state law causes of action.

PROCEDURAL BACKGROUND

Gold Forever and Holland filed this action against SAS, Wertheim and Pullman on March 11, 2008. The complaint alleged causes of action for declaratory relief, money had and received, conversion, and interference with prospective business advantage and contractual relations. Gold Forever and Holland sought a declaration as to their right to royalties from the assigned songs, the return of royalties wrongfully paid to SAS, Wertheim and Pullman, and an order that future royalties be paid to them.

SAS, Wertheim and Pullman filed a cross-complaint alleging causes of action for rescission and restitution, breach of contract, intentional misrepresentation, unfair business practices, conversion, declaratory relief, intentional interference with economic advantage, constructive trust and accounting. They sought rescission of Gold Forever and Holland's agreements with Dunbar, a declaration that they had the rights to Dunbar's songs, and to recover royalties to the songs.

SAS, Wertheim and Pullman filed a motion for summary judgment. In the alternative, they sought summary adjudication of the following issues: (1) Dunbar was entitled to the songwriter's share of the performance royalties. (2) The causes of action in the complaint were time-barred. (3) Gold Forever and Holland never had any right to Dunbar's performance royalties, (4) so as a matter of law, neither Dunbar nor SAS, Wertheim and Pullman could have misappropriated the royalties, (5) and they do not owe Gold Forever and Holland the royalties. (6) Dunbar's assignment to SAS of his right to performance royalties was valid. (7) Gold Forever and Holland had no superior rights to the royalties. (8) SAS, Wertheim and Pullman had no knowledge of the business relationship between Dunbar and Gold Forever and Holland, and (9) they did not commit any independently wrongful act that could subject them to liability for interference with prospective business advantage.

Gold Forever and Holland filed their own summary adjudication motion. They sought adjudication of their first cause of action for declaratory relief and a declaration that the 1976 assignment gave them the right to all royalties for the assigned songs, and their rights were superior to those of SAS, Wertheim and Pullman, and Dunbar's purported assignment of those rights to SAS, Wertheim and Pullman was invalid. Gold Forever and Holland also sought an adjudication that the first, second, fifth, sixth and ninth causes of action in the cross-complaint were barred by the statute of limitations.

The trial court denied SAS, Wertheim and Pullman's motion for summary judgment and for adjudication of issues (1) through (7). As to issues number (1) and (2), the court found "the undisputed facts submitted by [SAS, Wertheim and Pullman] do not negate the effect of the assignment from Dunbar to Holland." Neither did the undisputed facts establish that Gold Forever and Holland's causes of action were time-barred. They "failed to state as an undisputed fact or to introduce admissible evidence that 'Dunbar asserted his right to ownership in 1976.'" The court overruled the claim of laches and added that Gold Forever and Holland were "suing Pullman, a new party whose presence [they] became aware of in 2006, not Dunbar."

The court found issue (3) was irrelevant to the pleadings, since Gold Forever and Holland raised no issue based on Dunbar's breach of the 1976 agreement. As to issue (4), Gold Forever and Holland "introduced evidence that [SAS, Wertheim and Pullman] received and retained BMI Royalties that [Gold Forever and Holland] first learned of in 2006, well within the statute of limitations for their conversion claim." As to issues (6) and (7), the validity of Dunbar's assignment to SAS, Wertheim and Pullman, the court found Gold Forever and Holland presented evidence of the assignment's invalidity.

The court granted summary adjudication of issues (8) and (9). It found no triable issue of fact regarding SAS, Wertheim and Pullman's lack of knowledge of the contracts between Dunbar and Gold Forever and Holland and therefore no triable issue of fact as to liability for intentional interference with prospective business advantage.

The trial court granted Gold Forever and Holland's motion for summary adjudication. It found "that the language of the 1976 Assignment Agreement from Ronald Dunbar to Edward J. Holland, Jr. clearly and unambiguously assigned all rights to Holland, including contractual royalty rights pertaining to the [assigned songs]." Additionally, "the anti-assignment provisions in the 1968 and 1974 Songwriter agreements were valid and prohibited the assignment of any rights under that contract without Gold Forever's written consent."

The trial court further found that "[t]he 1968 and 1974 songwriter agreements provided for the periodic payment of royalties and related obligations, and each failure to pay represents a separate cause of action . . . . Therefore, any breaches prior to the limitations period are barred."

Following the summary judgment order, Gold Forever and Holland dismissed their causes of action for money had and received and for conversion as to Pullman. The parties thereafter entered into a stipulation for entry of judgment in order to avoid a trial. They stipulated that Gold Forever and Holland's "claims for actual and punitive damages on the Second and Third Causes of Action, except for damages for receipt of royalties paid by BMI on Dunbar's assigned compositions, are dismissed without prejudice." Following additional briefing, "[t]he Court will take the Proposed Judgment under advisement pending its ruling on the motion on agreed facts. After ruling on the motion on agreed facts, the Court may complete and enter the Judgment accordingly." The court accepted this stipulation.

After the additional briefing, the court entered judgment in favor of Gold Forever and Holland. On their cause of action for declaratory relief, the court found the 1976 assignment assigned to Holland "any and all rights Dunbar then had" in the assigned songs. Holland then assigned "the songwriter's share of performance royalties" in the assigned songs to Gold Forever. Gold Forever was therefore entitled to the songwriter's share of performance royalties on the assigned songs from BMI.

Additionally, SAS, Wertheim and Pullman "have no right, title, and/or interest in any royalties payable by the Publisher to Dunbar from the songs created pursuant to the 1968 or 1974 Songwriter Agreements between Dunbar and Gold Forever . . . due to [SAS, Wertheim and Pullman's] failure to obtain written consent to the assignment as required by the anti-assignment provision in those contracts. As a result thereof, [SAS, Wertheim and Pullman] also have no interest in the publisher's share of the BMI performance royalties on Gold Forever published songs or any of the writer's or publisher's share of the royalties generated pursuant to the 1968 and 1974 exclusive songwriter's agreements . . . ." SAS, Wertheim and Pullman were required to pay prejudgment interest on the amount withheld from Gold Forever by BMI due to the dispute, totaling $21,780.01.

On Gold Forever and Holland's causes of action for money had and received and for conversion, the court awarded them $129,108.19, "constituting Dunbar's share of the songwriter's royalties from the Assigned Compositions paid by BMI to [SAS, Wertheim and Pullman], plus $48,450.94 in prejudgment interest. The court awarded nothing on

Gold Forever and Holland's causes of action for intentional interference with prospective business advantage and contractual relations, and nothing on SAS, Wertheim and Pullman's cross-complaint.

SAS, Wertheim and Pullman then filed a notice of intention to move for new trial on the grounds the judgment was against the law, the court made errors of law, the damages were excessive, and there was newly discovered evidence. (Code Civ. Proc., § 657, subds. (4)-(7).) Specifically, they claimed the scope of the 1976 assignment should not have been resolved on summary judgment; the court failed to consider the statute of limitations defense; the court failed to apply the anti-assignment provisions in the 1968 and 1974 agreements to the 1976 assignment to Holland; the damages were excessive; and Pullman should not have been held personally liable on the declaratory relief cause of action. In support of the new trial motion, SAS, Wertheim and Pullman submitted declarations by Pullman and numerous exhibits and other documents.

The trial court denied the new trial motion. It found there were no new facts or evidence supporting the motion.[5]

DISCUSSION

A. *Standard of Review*

Summary adjudication of a cause of action or affirmative defense may be granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to [adjudication of the cause of action or affirmative defense] as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court,

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5 Appellants raise no specific contention regarding the propriety of the trial court's denial of their motion for new trial. Accordingly, any such contention is forfeited. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125.)

and all inferences reasonably deducible from the evidence . . . .” (Code Civ. Proc., § 437c, subds. (c), (f)(1) & (2).)

In determining the propriety of a summary adjudication, the trial court is limited to facts shown by the evidentiary materials submitted. (*Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 962; *McDaniel v. Sunset Manor Co.* (1990) 220 Cal.App.3d 1, 5.) Notwithstanding the strict construction given the moving party’s evidence and the liberal construction given to that of the opposing party, the opponent has the burden of showing triable issues of material fact do exist; he or she may not rely on the pleadings. (*Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 596; *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1524.)

In addition, each party must provide the court with a separate statement of facts setting forth the material facts the parties contend are undisputed or disputed, supported by references to the evidence. (Code Civ. Proc., § 437c, subd. (b)(1) & (3).) The failure to provide a separate statement may in the court’s discretion constitute a sufficient ground for denying or granting the motion. (*Ibid*.)

On appeal, we exercise our independent judgment in determining whether there are no triable issues of material fact and the cause of action or affirmative defense may be adjudicated as a matter of law. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579; *Torres v. Cool Carriers A.B.* (1994) 26 Cal.App.4th 900, 904.) We examine the evidence and independently determine its effect. (*Crouse v. Brobeck, Phleger & Harrison*, *supra*, 67 Cal.App.4th at p. 1524.) Our determination as to “‘the validity of a summary [adjudication] is to be determined solely by the sufficiency of the [papers] which were before the court when the motion was heard, and this court will consider only the facts before the trial court at the time it ruled on the motion [citations].’ [Citation.]” (*Willard v. Hagemeister* (1981) 121 Cal.App.3d 406, 412; accord, *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 346.) Thus, in ruling on the propriety of the summary adjudication, we cannot consider the evidence to which objections were sustained or the evidence submitted in conjunction with the motion for new trial.

B. ***Scope of 1976 Agreement***

Appellants contend "[t]he 1976 short form copyright assignment did not transfer any of Dunbar's writer's share contractual royalties, including BMI royalties." Rather, it just transferred Dunbar's copyright rights. For this reason, they argue, the trial court should have granted summary judgment in their favor.

Initially, we note that in support of their contention, appellants rely heavily on evidence they submitted in support of their new trial motion. This evidence is not properly before us in reviewing the judgment; we consider only that evidence which was before the trial court in ruling on the summary adjudication motion. (*Federal Deposit Ins. Corp. v. Dintino*, *supra*, 167 Cal.App.4th at p. 346; *Willard v. Hagemeister*, *supra*, 121 Cal.App.3d at p. 412.)

Appellants suggest that the trial court's denial of respondents' objections to the evidence submitted in support of the new trial motion made it clear that the trial court "'considered' the evidence. . . . Accordingly, that evidence was properly before the trial court and thus properly before this Court." Appellants are incorrect.

That the trial court "considered" the evidence in determining whether or not a new trial should be granted does not mean that we may consider the evidence for the purpose of determining whether summary adjudication should have been granted. In making this determination, "'"[t]he appellate court must examine only papers before the trial court when it considered the motion, and not documents filed later. [Citation.]"'" (*Federal Deposit Ins. Corp. v. Dintino*, *supra*, 167 Cal.App.4th at p. 346.)

Appellants also submitted treatises and case law on short form copyright assignments in support of their new trial motion, which they claim establish that the 1976 agreement was a short form copyright assignment as a matter of law. They argue that we can rely on these documents, even though they were only submitted in support of the new trial motion, because the documents are not evidence.

Treatises are not law, and appellants effectively submitted them as evidence in support of their motion. While they may be judicially noticed and thus treated as evidence (*Whispering Pines Mobile Home Park, Ltd. v. City of Scotts Valley* (1986) 180

Cal.App.3d 152, 162), that did not happen here. Since the trial court did not take judicial notice of these documents, we cannot consider them. (*Federal Deposit Ins. Corp. v. Dintino*, *supra*, 167 Cal.App.4th at p. 346; *Willard v. Hagemeister*, *supra*, 121 Cal.App.3d at p. 412.)

Appellants also rely on the order dismissing respondents' counterclaims in the federal litigation. That order has no precedential value in this case. (*Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761.)

The document that Dunbar signed on January 26, 1976 does not identify itself as a short form copyright assignment. Neither does it, by its terms, limit its scope to copyright rights.

Rather, the document identifies itself as an "Outright Assignment of All Author's or Co-Author's Rights Including Any Such Interest in Copyrights," applying to "all of [Dunbar's] right, title and interest of every kind, nature or description in and to the musical compositions (music and/or arrangements, lyrics, etc.) . . . together with" the existing copyrights to the assigned songs and the right to renew the copyrights.

In interpreting a written agreement, the goal of the court is to give effect to the mutual intent of the parties as it existed at the time, insofar as that intent can be ascertained and is lawful. (Civ. Code, § 1636; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 525.) If the language of the agreement is clear and explicit and does not involve an absurdity, determination of the mutual intent of the parties and interpretation of the agreement is to be based on the language of the agreement alone. (Civ. Code, §§ 1638, 1639; *People ex rel. Lockyer*, *supra*, at p. 525.)

If the language of the contract is ambiguous or reasonably susceptible of more than one interpretation, the court may rely on parol evidence to clarify its meaning. (*Estate of Russell* (1968) 69 Cal.2d 200, 209; *Moss Dev. Co. v. Geary* (1974) 41 Cal.App.3d 1, 9.) However, parol evidence may not be used to give the contract a meaning to which it is not reasonably susceptible (*Estate of Sharp* (1971) 18 Cal.App.3d 565, 572) or to create duties contrary to the specific terms of the contract (*Du Frene v. Kaiser Steel Corp.* (1964) 231 Cal.App.2d 452, 457).

In interpreting an agreement, the whole of the agreement is to be interpreted together, "so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, *supra*, 107 Cal.App.4th at p. 525.)

We agree with the trial court that the plain language of the assignment indicates that it applies to *all* rights, not merely copyright rights. Were this not the case, there would be no need to specify that the assignment was "Including Any Such Interest in Copyrights," or to include the provision that these rights were assigned "together with" the copyrights and right to renew the copyrights.

Additionally, under the 1976 release and termination agreement, Dunbar relinquished "any and all rights to any royalties or compensation in respect to any of the masters or recordings or musical compositions" subject to the agreement. The language of this agreement is broad and inclusive and cannot be read to apply only to rights in the copyrights.

Appellants argue, in the alternative, that "summary adjudication regarding the 1976 short form copyright assignment was inappropriate because material factual disputes exist about the meaning of the assignment." This argument, as did appellants' original contention, rests on the premise that the assignment was "as a matter of law, a Short Form Copyright Assignment that transfers only copyright rights, as the federal court stated." This premise is incorrect. There was no evidence presented on the summary judgment motion that established that the assignment was a short form copyright assignment, and the federal court's statement does not have the force of law. (*Bolanos v. Superior Court*, *supra*, 169 Cal.App.4th at p. 761; *Federal Deposit Ins. Corp. v. Dintino*, *supra*, 167 Cal.App.4th at p. 346; *Willard v. Hagemeister*, *supra*, 121 Cal.App.3d at p. 412.)

Additionally, the only evidence to the contrary that appellants point to was submitted in conjunction with their new trial motion. We cannot consider this evidence in determining whether summary adjudication was proper. (*Federal Deposit Ins. Corp. v.*

Dintino, *supra*, 167 Cal.App.4th at p. 346; *Willard v. Hagemeister*, *supra*, 121 Cal.App.3d at p. 412.)

In sum, the plain language of the 1976 assignment assigned to Holland all of Dunbar's rights to the assigned songs, including the right to receive performance royalties. The trial court properly adjudicated summarily respondents' declaratory relief cause of action.

C. *Anti-Assignment Provisions in the 1968 and 1974 Songwriting Agreements*

Appellants next contend that the trial court erred in ruling that the anti-assignment provisions in the 1968 and 1974 songwriting agreements invalidated Dunbar's assignment of his rights to appellants, because the assignment was without Gold Forever's consent. Under Michigan law, they claim, the right to be paid money in the future is freely assignable, despite an anti-assignment provision.

As set forth above, the songwriting agreements provided, "No moneys due or to become due to Writer shall be assignable . . . without prior written consent of Publisher. If any assignment of such moneys is made by Writer without such prior written consent, no rights of any kind against Publisher will be acquired by the assignee . . . ." The agreements also provided, "Writer agrees not to assign, hypothecate or transfer any of his rights under this agreement and any attempted assignment shall be void. Publisher shall not be obligated to recognize any assignment of any sums due or to become due from Publisher to Writer." Additionally, the agreements provide that they "shall be construed only under the laws of the State of Michigan."

The question then is whether the anti-assignment provision is valid under Michigan law. Appellants claim that "[u]nder Michigan law . . . , rights to be paid money in the future (or over time) are freely assignable, despite an anti-assignment provision." Respondents argue that "Michigan law will uphold a valid contractual restriction on assignability." Both positions have validity.

Michigan law recognizes "that 'courts have striven to uphold freedom of assignability.'" (*Detroit Greyhound Emp. Fed. C. U. v. Aetna Life Ins. Co.* (1969) 381

Mich. 683, 689 [167 N.W.2d 274, 277].) In *Wonsey v. Life Ins. Co. of North America* (E.D. Mich. 1998) 32 F.Supp.2d 939, which involved the purported assignment of the right to receive a structured settlement which was subject to an anti-assignment provision, the court observed that "the modern trend with respect to contractual prohibitions on assignments is to interpret these clauses narrowly, as barring only the delegation of duties, and not necessarily as precluding the assignment of rights from assignor to the assignee. The rationale behind these cases is derived from the implicit recognition that the obligor, the party obligated to perform, would not suffer any harm by a mere assignment of payments under a contract. Harm to obligor would result, however, in cases involving personal services contracts or other situations where the duties owed to the parties may change depending on the identity of the assignee. [Citation.]" (*Id*. at p. 943, italics omitted.) In light of this "modern trend . . . favoring the assignment of periodic payments under structured settlement agreements," the court refused to enforce the anti-assignment provision and ordered the defendant to comply with the assignment of the settlement payments. (*Id*. at p. 944.)

Michigan law also "recognizes the validity of contractual provisions against assignment of contracts." (*Century Indem. Co. v. Aero-Motive Co.* (W.D. Mich 2003) 318 F.Supp.2d 530, 539.) However, because of the preference for free assignability of contracts, "those who would compose a contractual bar against alienation must use '[t]he plainest words'" and "'[c]lear language'" to bar assignability. (*Detroit Greyhound Emp. Fed. C. U. v. Aetna Life Ins. Co., supra,* 381 Mich. at pp. 689-690 [167 N.W.2d at pp. 277-278].)

The language of the anti-assignment provisions here was crystal clear. Any potential assignees reading the 1968 and 1974 music publishing agreements would be on notice of the requirement of written consent for a valid assignment. The trial court therefore correctly found that, under Michigan law, "the anti-assignment provisions in the

1968 and 1974 Songwriter agreements were valid and prohibited the assignment of any rights under that contract without Gold Forever's written consent."[6]

D. ***Statute of Limitations and Laches***

The undisputed evidence established that Holland did not require Dunbar to pay to Gold Forever "the songwriter's share of performance royalties" in the assigned songs that Dunbar received from BMI. Based on Holland's inaction, appellants claim, he is barred by laches from asserting his and Gold Forever's rights under the 1976 assignment. They further claim that Pullman, as Dunbar's assignee, is able to assert all of Dunbar's defenses.

Appellants fail to explain exactly how respondents' claims are barred by the applicable statute or statutes of limitations. Respondents were not seeking to recover the writer's share of performance royalties back to 1976, when Dunbar executed the assignment. They were seeking only those performance royalties that BMI paid to appellants after Dunbar's 2004 assignment of the royalties to appellants.

Neither have appellants demonstrated the applicability of laches. As noted in *Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424 at page 439, "[l]aches is an unreasonable delay in asserting an equitable right, causing prejudice to an adverse party such as to render the granting of relief to the other party inequitable." Because laches is an equitable defense, it "is unavailable in an action at law for damages." (*Ibid*.) The court explained that "'[t]he equitable doctrine of laches has a legal equivalent in the statutes of limitations. To allow a laches defense in a legal action would be to override a time limit mandated by the Legislature.'" (*Ibid*.) This is a legal action for damages.

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6 We agree with appellants that the anti-assignment provisions in the 1968 and 1974 agreements did not apply to Dunbar's share of the BMI royalties, which were not "due from Publisher to Writer." However, in the 1976 agreement, Dunbar assigned to Holland the right to receive his BMI royalties as to the assigned songs, and Holland later assigned that right to Gold Forever. Thus, it is under the 1976 agreement that Gold Forever is entitled to the writer's share of the BMI royalties in the assigned songs and not under the 1968 and 1974 songwriting agreements.

Moreover, in order for laches to apply, there must be "'unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.'" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.) Appellants point to no evidence that respondents delayed unreasonably in filing suit once they learned of Dunbar's assignment of his rights to appellants and appellants' receipt of royalties from the assigned songs. Neither do appellants point to evidence that they were prejudiced by any delay.

That respondents did not force Dunbar to pay them royalties rather than to offset the royalties he received from BMI against the royalties due him from Gold Forever did not harm appellants. What harmed appellants was Dunbar's failure to disclose to them the existence of the 1976 assignment. And indeed, appellants cite no evidence that either they or Dunbar relied on respondents' failure to collect BMI performance royalties from Dunbar when they entered into the 2004 assignments.

Appellants have the affirmative burden on appeal of demonstrating that the judgment is infected by prejudicial error. (*Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971; *Mohn v. Kohlruss* (1987) 196 Cal.App.3d 595, 598.) They must "convince the court, by stating the law and calling relevant portions of the record to the court's attention, that the trial court decision contained reversible error." (*Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.) They have failed to meet their burden of demonstrating the existence of a triable issue of fact as to their defenses of expiration of the statute of limitations and laches.

E. *Rescission*

Appellants next assert that their "rescission claim is not time-barred." This assertion is supported only by a citation to the trial court's ruling and to authority for the proposition that if there is a continuing contractual duty to pay royalties, each failure to pay constitutes a new claim and starts the running of a new limitations period.

Appellants fail to indicate how the foregoing principle applies to a cause of action for rescission. They point to no evidence submitted on the summary adjudication motions that supports their assertion. They have utterly failed to meet their burden of demonstrating error. (*Fundamental Investment etc. Realty Fund v. Gradow*, *supra*, 28 Cal.App.4th at p. 971; *Mohn v. Kohlruss*, *supra*, 196 Cal.App.3d at p. 598; *Culbertson v. R. D. Werner Co., Inc.*, *supra*, 190 Cal.App.3d at p. 710.)

F. *Pullman's Personal Liability for the Judgment*

The judgment provided that "[d]efendants shall pay prejudgment interest on the amount withheld by BMI that is due to Gold Forever." Pullman asserts that the trial court erred in including him personally in this portion of the judgment, in that he never claimed a right to the BMI royalties in his personal capacity. Pullman also asserts that he preserved this issue for appeal, in that he raised it in his new trial motion. Respondents counter that Pullman invited the error, and he could not revive it by filing a new trial motion.

After the trial court ruled on the parties' summary judgment/adjudication motions, it accepted the parties' stipulation as to entry of judgment. The court agreed that following additional briefing, "[t]he Court will take the Proposed Judgment under advisement pending its ruling on the motion on agreed facts. After ruling on the motion on agreed facts, the Court may complete and enter the Judgment accordingly."

According to respondents' trial counsel, Richard J. Burdge, Jr., prior to the parties' entering into the stipulation, "I sent Mr. Besser [counsel for appellants] a proposed judgment for his consideration in reaching agreement along with a spreadsheet showing each BMI payment to [appellants] and how [respondents] had calculated the exact amounts due to [respondents]. In response to comments received from Mr. Besser and *pro se* Defendant Mr. Pullman, [respondents] made several concessions regarding the matters in the judgment. . . . [Appellants] did not raise any issue regarding the liability of [SAS or Wertheim] on the two remaining causes of action, but they did raise an issue regarding Mr. Pullman's personal liability."

Attorney Burdge continued: "in an effort to avoid a trial on Mr. Pullman's personal liability on the money had and received and conversion causes of action, I proposed a tolling agreement that would allow a judgment to be entered against SAS and Wertheim without the need for a liability trial against Mr. Pullman. That proposal was rejected, so Plaintiffs ultimately dismissed those two causes of action as to Mr. Pullman to avoid a trial. . . .”

Attorney Burdge added that “[p]rior to reaching the final stipulations, [respondents] dismissed Mr. Pullman from the two remaining causes of action. I submitted to Mr. Besser a revised Proposed Judgment, Stipulated Facts Relating to the Statute of Limitations Issue, and a Stipulation for Order Regarding Deciding Remaining Issues by Motion and for Entry of Judgment. After making minor revisions requested by [appellants], the stipulations were executed and submitted to the Court at the Final Status Conference on August 28, 2009. At no time did Mr. Besser raise an issue of liability on the second and third causes of action—only the statute of limitations. The Court signed the proposed Order that day.”

Thereafter, the court signed the judgment. On the first cause of action for declaratory relief, the judgment was against “defendants” generally. On the second and third causes of action for money had and received and conversion, the judgment was against SAS and Wertheim.

In the new trial motion, appellants claimed that Pullman should not have been held personally liable on the declaratory relief action, in that he was not a party to the dispute, he never claimed BMI royalties in his individual capacity, and there was no evidence that he committed any wrongdoing.

In opposition to the motion, respondents claimed that Pullman was properly liable for the judgment. They pointed out that Pullman was a named defendant. He moved for summary judgment and opposed respondents’ summary judgment motion. Because he lost on summary judgment, respondents included him in the proposed judgment. Additionally, “Pullman himself reviewed and commented on the draft Proposed Judgment but did ***not*** raise any objection to the fact that he was included in the Judgment.”

The issue was argued at the hearing on the new trial motion. The trial court accepted respondents' position that since Pullman was named in the declaratory relief cause of action and respondents prevailed on that cause of action, Pullman was liable.

Appellants cite *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949 for the proposition that raising a claim of error in a new trial motion is sufficient to preserve it on appeal. *Myers* does not support their position.

In *Myers*, the plaintiff obtained a judgment for compensatory and punitive damages. By special verdict, the jury found the defendant liable on the plaintiff's breach of contract cause of action and found defendant guilty of oppression, fraud or malice. The special verdict form did not ask the jury to make any findings on the plaintiff's fraud cause of action. The defendant moved for a new trial on punitive damages, on the ground the punitive damage verdict was not authorized by law. The trial court denied the motion. The defendant appealed, challenging the punitive damages award. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.*, *supra*, 13 Cal.App.4th at pp. 954-956.)

On appeal, the court found punitive damages were not properly awarded on the breach of contract cause of action and therefore had to be stricken. The plaintiff claimed "that it was [the defendant's] responsibility to obtain special verdict findings on the fraud cause of action and that [the defendant] has waived its right to assert the deficiency in the verdict form by failing to object." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.*, *supra*, 13 Cal.App.4th at p. 961.) The court pointed out, however, that it was the plaintiff who was "attempting to enforce the judgment based on the special verdict and must bear the responsibility for a special verdict submitted to the jury on its own case." (*Id*. at pp. 961-962.) Additionally, the defendant had "attempted repeatedly to bring this problem to the attention of [the plaintiff's] trial counsel and the trial court, through its motions prior to the punitive damage phase of the trial, and following the trial, through motions for judgment notwithstanding the verdict and for new trial. Thus, the absence of a tort special verdict finding could have been remedied prior to the discharge of the jury." (*Id*. at p. 962, fn. omitted.)

In *Myers*, the party claiming error on appeal brought the matter to the attention of the opposing party and the trial court, prior to judgment, as well as in the new trial motion. Here, although the issue of Pullman's individual liability was raised in discussions between the parties prior to submission of the case for judgment, appellants made no effort to resolve the issue or to challenge the proposed judgment due to its inclusion of Pullman in his individual capacity. *Myers* does not support the proposition that by allowing the trial court to sign a proposed judgment to which appellants had objections, and then raising the objections in a new trial motion, the issue is preserved for appeal.

In their reply brief, appellants argue that the judgment against Pullman was the result of a mistake, there is no evidence to support it, and respondents "do not attempt to offer any substantive explanation" as to why the judgment against Pullman should stand. Of course, it is appellants' burden on appeal to demonstrate the existence of error (*Fundamental Investment etc. Realty Fund v. Gradow*, *supra*, 28 Cal.App.4th at p. 971; *Mohn v. Kohlruss*, *supra*, 196 Cal.App.3d at p. 598), not respondents' burden to demonstrate the absence of error. Meeting this burden requires citations to the record to direct the court to the pertinent evidence or other matters in the record which demonstrate reversible error. (Cal. Rules of Court, rule 8.204(a)(1); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115; *Culbertson v. R. D. Werner Co., Inc.*, *supra*, 190 Cal.App.3d at p. 710.) It also requires citation to relevant authority and argument. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.) Appellants have failed to meet this burden with respect to their claim that Pullman should not be personally liable for the judgment.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.