Filed 2/22/12 Camden Technologies v. Oracle America CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CAMDEN TECHNOLOGIES, INC., Plaintiff and Appellant, v. ORACLE AMERICA, INC. et al., Defendants and Respondents.	B217783 (Los Angeles County Super. Ct. No. SC097958)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Grimes, Judge. Affirmed.

Simkin & Associates, Michael J. Simkin; Athan Aronis; and Joseph Cardella for Plaintiff and Appellant.

Baker Marquart Crone & Hawxhurst; Crone Hawxhurst and Daryl M. Crone for Defendants and Respondents.

INTRODUCTION

Plaintiff Camden Technologies, Inc. (Camden) appeals from a summary judgment entered in favor of defendants Oracle USA, Inc., for itself and as successor in interest to BEA Systems, Inc., and Tony Sanders. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Camden was a computer software services company that sold sophisticated, expensive software to its customers and provided them with installation services and programming support for the software.[1]

In 2004, BEA Systems, Inc. was a vendor of middleware, a type of enterprise infrastructure software. In 2008, Oracle USA, Inc. acquired BEA and, during the pendency of this appeal, Oracle America, Inc. became the successor in interest to Oracle USA, Inc. The three entities are referred to herein, individually and collectively, as Oracle.

In addition to its own internal sales team, Oracle developed a Value Added Reseller (VAR) program by contracting with various third parties to sell its products to end users and provide related support services to them. Until May 2008, defendant Tony Sanders (Sanders) was one of Oracle's employees responsible for managing the VAR program.

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[1] The only statement of facts appearing in Camden's opening brief was less than one page in length and contained only one reference to the record. It does not comply with the requirement that an "appellant's opening brief must: [¶] . . . [¶] . . . [p]rovide a summary of the significant facts limited to matters in the record." (Cal. Rules of Court, rule 8.204(a)(2)(C).) However, in their respondent's brief, Oracle and Sanders (collectively defendants) provided a lengthy statement of facts. Defendants' statement of facts was the starting point for this factual and procedural background. We will disregard Camden's noncompliance. (Cal. Rules of Court, rule 8.204(e)(2)(C).)

In August 2004, Camden and Oracle signed a written VAR agreement whereby Camden would be a VAR authorized to sell Oracle's software products and provide related support services to end users. From 2005 until the last of the agreements expired in 2007, the parties entered into substantially similar agreements, referred to as "click wrap" agreements, by clicking on an acceptance link on an online version of the agreement appearing on Oracle's Internet website. After Camden received notice from Oracle that Camden's VAR agreement had expired on October 10, 2007, Camden and Oracle signed another written VAR agreement in January 2008. By its terms, that agreement expired in January 2009.[2]

The 2004 VAR agreement granted to Camden a non-exclusive, non-transferable right to resell Oracle's software to end users, but only on a limited usage basis. Camden could resell only to end users which were not identified by Oracle as its customers to which Oracle intended to sell directly. Camden was obligated to sell Oracle's support services for the resold software for the first year, but all support services renewals were to be handled between Oracle and the end user. The term of the agreement was "for a period of one (1) year from the Effective Date . . . ." A provision in the 2004 VAR agreement included an integration clause stating that the agreement "constitutes the entire agreement and supersedes all prior or contemporaneous oral or written agreements regarding the subject matter" of the agreement. The same provision required that any "amendment or modification of the agreement must be in writing signed by both parties."

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[2] None of the parties submitted copies of any of the "click wrap" agreements to the trial court and, hence, no copies are included in the record on appeal. Camden did not attach copies of the signed written 2004 and 2008 VAR agreements to its complaint. However, copies of the agreements were submitted by Camden's counsel and defendants' counsel as exhibits to their declarations filed in support of their respective positions on the motion for summary judgment. No party objected to any of the copies. Attached as Exhibit A to the First Amended Complaint was an incomplete and unsigned form contract, the terms of which substantially correspond to the completed and fully signed 2004 VAR agreement attached to the declarations.

The 2008 VAR agreement was substantially the same as the 2004 version. One notable difference, however, was that either party could terminate the agreement "for convenience for any reason upon thirty (30) days' prior written notice to the other party." Also, Camden's obligation to sell Oracle's support services to end users was no longer limited to the end user's first year of use of the resold software, and there was no longer any requirement that support services renewals had to be handled between Oracle and the end user.

Camden understood that, as a VAR, it would obtain sales leads not only from its own efforts, but also from Oracle. In addition, to facilitate sales to its customers, Camden could work with Oracle's employees to obtain discounts off of list price, or special bids, for Oracle's software and services.

On November 26, 2008, Camden filed its first amended complaint, the operative complaint herein. In the general allegations of the complaint, Camden alleged that Oracle, through Sanders, represented to Camden that Oracle would use its best efforts to facilitate sales and sales leads to Camden from third parties, would provide support and maintenance as requested on Oracle's products sold by Camden, would cooperate with Camden as far as marketing, business development, and education of customers, and would not interfere with Camden's business relationships with its customers. In addition, Oracle represented that it would cooperate with Camden's relationships with distributors of Oracle's software, such as Agilysis, Arrow Electronics and Avnet.

Camden also alleged that Oracle breached the VAR agreement "in many ways," including but not limited to, eight specific instances, involving events which occurred in 2007.[3]

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[3] The 2007 events were as follows: (1) According to Camden, Oracle was responsible for Camden's client, Affinity Mobile (Affinity), ceasing to do business with Camden and doing business, instead, with Oracle. Specifically, in January 2007, Oracle first approved a special bid, a 60 percent discount off retail price, for Camden's sale to Affinity, but cancelled the approval after Camden notified Affinity of the sale price. Although Oracle subsequently re-approved the special bid, Affinity did not complete the

Following its general allegations, Camden alleged six causes of action as follows: first, breach of contract as to Camden's VAR agreements with Oracle; second, negligent misrepresentation which induced Camden to enter into the agreements; third, unfair trade and business practices in violation of the California Unfair Competition Law (UCL, Bus. & Prof. Code, § 17200 et seq.) which defendants engaged in with the intent to damage Camden's business relationship with its customers; fourth, intentional interference with prospective economic advantage; fifth, negligent interference with prospective economic

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sale and ceased doing business with Camden. In April 2007, Oracle sold software and services to Affinity for $400,000.

(2) In September 2007, Oracle damaged Camden's relationship with its customer, Zenith Insurance (Zenith), by failing to provide server software upgrades for products and related maintenance services which Camden sold Zenith.

(3) Oracle abruptly cancelled its participation just before a May 2007 marketing conference set up by Camden to sell Oracle's products in Dallas. Camden alleges Oracle's action damaged its reputation with about twenty potential corporate clients, which ultimately led to Camden closing its Dallas operation.

(4) Camden was the vendor of record for Oracle's products for San Diego Superior Courts and was entitled to provide support for the products, but Sanders and Oracle prevented "this from occurring as provided for by" the VAR agreement. Oracle prevented Camden "from being able to quote" to its customer, the San Diego Superior Courts, and, as a result, Camden could not sell Oracle's products or related maintenance services to its customer.

(5) Oracle misrepresented and manipulated the internal sales "deal" registration system, excluding Camden and its distributor Agilysys/Arrow from the system. Oracle sold directly to customers, including Northrop Grumman and threatened Northrop with loss of support if it did business with Camden.

(6) Oracle prevented Camden from making online requests for software using the online partner lead registration system. This action delayed Camden's ability to be a reseller for Oracle's products, thereby driving Camden from being a reseller.

(7) Oracle locked Camden out of ordering software from Oracle using the online discount request system. Oracle sent a letter dated November 14, 2007 which, according to Camden, wrongfully terminated the VAR agreement, in that it did not comply with the required 30-day notice.

(8) The "business relationship" was subsequently reinstated "on paper." The Dallas inside sales national call center halted communication with Camden.

advantage; and sixth, interference with contractual relations between Camden and its customers.

Defendants demurred to the complaint. The trial court sustained the demurrer as to the UCL cause of action only. The court denied Camden leave to amend the cause of action.

Following substantial discovery efforts, defendants filed a motion for summary judgment as to the remaining causes of action. After consideration of the papers filed by the parties and a hearing, the trial court granted defendants' motion for summary judgment. The court then entered judgment in favor of defendants and against Camden as to all causes of action.

DISCUSSION

Camden contends that the trial court erred in sustaining the demurrer as to the third cause of action without leave to amend the complaint. As to the motion for summary judgment, Camden raises claims concerning procedure, evidentiary rulings, and the existence of triable issues of material facts with respect to a limited number of the causes of action. As we explain more fully below, Camden's contentions and claims lack merit.

A. *Demurrer to the UCL Cause of Action*

Camden contends that the trial court improperly sustained defendants' demurrer without leave to amend as to the third cause of action alleging unfair trade and business practices in violation of the UCL. When reviewing the sustaining of a demurrer without leave to amend, "we determine whether the complaint states facts sufficient to state a cause of action." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We accept as true all material facts properly pleaded by the plaintiff. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) We give the complaint's allegations in the cause of

action "a reasonable interpretation," reading the complaint "as a whole" and the allegations in the cause of action "in their context." (*Ibid.*)

We review the denial of leave to amend for abuse of discretion. (*Schifando v. City of Los Angeles, supra,* 31 Cal.4th at p. 1081.) If we determine that there is a reasonable possibility the plaintiff could cure the defect with an amendment, "we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Ibid.*) The plaintiff must show the manner in which the complaint can be amended in order to state a cause of action. (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 414.) "'[L]eave to amend should *not* be granted where . . . amendment would be futile.' [Citation.]" (*Id.* at pp. 414-415.)

According to Business and Professions Code section 17200, "unfair competition" means and includes "any unlawful, unfair or fraudulent business act or practice . . . ." The unlawful prong includes violation of "'[v]irtually any state, federal or local law.'" (*People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 515.) "The unfairness prong has been employed to enjoin deceptive or sharp practices" and includes "unconscionable provisions in standardized agreements." (*Id.* at pp. 515-516, italics omitted; see *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184-187 [review of varying definitions of "unfair" depending upon factual circumstances].) For the fraud prong, "'[t]he test is whether the public is likely to be deceived.'" (*People ex rel. Bill Lockyer, supra,* at p. 516.) The fraud prong "'bears little resemblance to common law fraud or deception'" and "'can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage.'" (*Id.* at pp. 516-517.)

Camden first contends that the trial court sustained the demurrer for improper reasons. According to Camden, the court's reason was that the court "simply did not want to have an Unfair Trade and Businesses Practices [A]ct case before it." As support, Camden cites the court's statement that "I've never ever seen anyone take a U.C.L. case

to trial, except one time . . . and the lawyers were . . . befuddled as to how to try the case because no one has ever done it."

Camden fails to acknowledge the portion of the record showing that the trial court's stated reason for sustaining the demurrer was "that the complaint alleges breach of contract" and other contract-based causes of action, but "[t]here are no allegations of conduct that constitute unlawful or unfair practices as those terms are defined in U.C.L." In our review of the complaint, we reach the same conclusion.

Camden further asserts that applicable law provides that the determination of whether a business practice is "unfair" or "fraudulent" under the UCL is a question of fact, and, thus, it "cannot usually be made on demurrer." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1473). Camden claims that its allegations of specific business conduct created such questions of fact and, therefore, the trial court erred in sustaining the demurrer. We disagree.

The unfair competition Camden alleged in the third cause of action was that defendants made misrepresentations to Camden and engaged in actions that constituted intentional interference with Camden's business relationships with its customers, all with the intent and purpose to injure Camden. The specific conduct Camden alleged included that defendants acted with the intent to induce Camden to solicit customers and then defendants "'stole'" them; defendants "placed artificial and intentional barriers (e.g., not cooperate with 'special bids') and/or concocted ways not to pay [p]laintiff money it would have been entitled to receive."[4] Plaintiff sought at least $5 million in damages and statutory attorney's fees and costs of suit. (Bus. & Prof. Code, § 17082.) In addition, plaintiff sought an injunction against defendants to prevent any further interference by defendant with plaintiff's relationships with its prospective and existing customers.

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[4] In the third cause of action, Camden also alleged that defendants' manipulation of the customer relationship forecast accounting system "may also be a violation of the Sarbanes Oxley Act." Camden did not, however, address the allegation in its briefing on appeal. We therefore treat the issue as abandoned and do not address it on the merits. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

As in the complaint so also in Camden's opening brief on appeal, Camden does not identify which specific acts by Oracle or Sanders allegedly constituted "unfair" and/or "fraudulent" practices under the UCL. Camden does not present argument supported by legal authority to explain why any act by defendants is actionably "unfair" and/or "fraudulent" as "unfair competition" pursuant to Business and Professions Code section 17200. We are "'not required to make an independent, unassisted study of the record in search of error,'" develop an appellant's argument or otherwise act as counsel for the appellant. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116.) It is also not our role to construct a theory supportive of a plaintiff's claims. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) We may treat an appellant's contention as forfeited for failure to provide adequate briefing. (*Ibid.*; see also *Guthrey*, *supra*, at p. 1116.) "This principle is especially true when an appellant makes a general assertion, unsupported by specific argument, regarding insufficiency of evidence." (*Stanley*, *supra*, at p. 793.)

Thus, we may affirm the trial court's decision to sustain the demurrer on the basis that Camden has forfeited any error due to inadequate briefing on appeal. The inadequacy of Camden's briefing, however, is but the extension of the inadequacy of Camden's allegations in its complaint. Without any allegations of specific acts constituting "unfair" and/or "fraudulent" practices under the UCL conduct, the complaint fails to state facts sufficient to state a cause of action for unfair business practices under the UCL. (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081.) For the foregoing reasons, we conclude that the trial court properly sustained the demurrer.

As to denial of leave to amend, Camden claims the court did not give a proper reason, but rather simply stated "there is no point in trying." It was Camden's burden to show the manner in which the complaint could be amended in order to state a UCL cause of action. (*Davaloo v. State Farm Ins. Co.*, *supra*, 135 Cal.App.4th at p. 414.) Camden failed to do so at the hearing on the demurrer and in its opening brief on appeal. In the absence of a showing by Camden that there was a reasonable possibility the complaint

could be amended to cure the defect, the trial court's denial of leave to amend was not an abuse of discretion. (*Schifando v. City of Los Angeles, supra*, 31 Cal.4th at p. 1081.)

B. *Summary Judgment Procedural Issues*

1. Order Shortening Time

Camden challenges the trial court's orders for shortening time for notice of the hearing on defendants' motion for summary judgment and the court's denial of Camden's subsequent ex parte application for continuance of the hearing. The challenges are without merit. The record reveals that the factors relevant to scheduling the hearing were within Camden's control rather than the result of any abuse of discretion by the trial court.

Camden is mistaken in claiming that the trial court erred by shortening time for notice of the summary judgment hearing to 40 days instead of the statutory 75 days. A trial court does not have authority to shorten time for notice of a summary judgment hearing and only may do so if the parties consent. (*Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1262.) Camden admits it stipulated to the shortening of time first in January 2009 and then again in March, but it claims that it agreed to the second stipulation only because the trial court threatened to impose sanctions against Camden and its counsel. Camden's claim is not supported by the record.

Camden initiated the stipulation to shorten time in January, insisting on keeping the trial date rather than extending it as defendants desired at that time. Camden's own actions created the need for the second stipulation and order in March. As a result of Camden's failure to provide proper discovery responses, defendants brought a motion to compel and the court granted it. Camden promptly requested an extension of the time to respond. The court granted a brief extension but urged the parties to determine if another order shortening time was needed in order to meet statutorily mandated notice requirements for the summary judgment hearing and, if so, to enter into a stipulation in order to avoid postponing the hearing and changing the trial date. The court signaled the

Camden's role in creating the time-critical situation by advising that, if a stipulation was needed, but no stipulation was reached in a timely fashion, then the court would be inclined to sanction Camden's counsel. Camden made no subsequent reference to the comment. As the trial court correctly observed, "[t]he importance of providing the [mandated] minimum statutory notice of a summary judgment hearing cannot be overemphasized." (*Robinson v. Woods*, *supra*, 168 Cal.App.4th at p. 1262.)

Camden raised no objection to entering into either the March stipulation or to the resultant order at the time it was granted. Its failure to make a timely objection in the trial court proceedings resulted in forfeiture of the issue on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.)

2. Denial of a Continuance

Camden next contends that the trial court erred in refusing to grant its request for a continuance of the summary judgment hearing. Shortly before the date set for the hearing, Camden made an ex parte application for a continuance. The trial court denied the application. Camden again requested the continuance during the summary judgment hearing, and the trial court again denied it. We review denial of a party's request for continuance of a summary judgment hearing for abuse of discretion. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

Generally, a trial court must grant a continuance to a party opposing a motion for summary judgment if the party makes a declaration, in good faith, showing good cause for the continuance. (Code Civ. Proc., § 437c, subd. (h);[5] *Bahl v. Bank of America*

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[5] Code of Civil Procedure section 437c, subdivision (h), provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due."

(2001) 89 Cal.App.4th 389, 395.) In order to show good cause for a continuance, the party must submit a declaration showing that "facts essential to justify opposition may exist but cannot, for reasons stated, then be presented" (Code Civ. Proc., § 437c, subd. (h)); there is reason to believe such facts exist; reasons why additional time is needed to obtain the facts; and justification why such discovery could not have been completed sooner. (*Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at pp. 254, 257.) "An inappropriate delay in seeking to obtain the facts may not be a valid reason why the facts cannot then be presented." (*Id.* at p. 257.)

In his declaration, Camden's counsel, Michael Simkin, made brief conclusory statements that "there is evidence likely to be found" in additional documents Camden was seeking from defendants in a motion to compel which was set for four days *after* the summary judgment hearing, and the documents were "critical" to Camden's opposition to the summary judgment motion. In opposition, defendants submitted a declaration detailing the extensive discovery which it had already provided at Camden's request.[6] The trial court denied the continuance on the basis of lack of good cause. The trial court noted that there already had been extensive discovery and stated: "Plaintiff has not demonstrated entitlement to a continuance pursuant to [Code of Civil Procedure] section 437c, because there is no evidence in the Simkin declaration or anywhere else that there are facts essential to justify opposition to the motion which could not have been presented." We agree. The trial court therefore did not abuse its discretion in denying Camden's request for a continuance. (*Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at p. 254.)

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6 Defendants provided a declaration of their counsel, Jonathan M. Jenkins, which stated that defendants had responded to Camden's first 35 special interrogatories on the date due (April 10, 2009), all five sets of form interrogatories and the first set of substantive requests for admissions, and that defendants had spent over $100,000 for electronic discovery responses and had produced 14,000 pages of documents in response to Camden's deposition notices. The declaration stated that defendants had made an additional 20,000 pages available for inspection or copying, but Camden's counsel had never contacted defendants' counsel to review the additional documents.

3. Failure to State Reasons

Review of the record shows that there is no merit to Camden's next claim—that the trial court did not give reasons for granting the motion for summary judgment, thereby violating Code of Civil Procedure section 437c, subdivision (g).[7] In addition to discussing its reasons during the summary judgment hearing, the trial court issued a 12-page minute order detailing its reasons for granting defendants' motion.

Camden also asserts that the minute order should have been "made a part of" the documents identified as the trial court's order and judgment and the amended order and judgment. Further Camden cites other purported errors in other aspects of the trial court's handling of its written decision. Camden cites no supporting authority that any of its procedural issues constitutes reversible error. We know of none and conclude there is no merit to plaintiff's procedural issues.

C. *Summary Judgment Evidentiary and Merits Issues*

Camden's remaining contentions tangentially brush on the merits of the grant of summary judgment. Camden claims defendants failed to present facts properly in its separate statement, the trial court erred in recognizing the defendants' separate statement as setting forth facts in dispute, in shifting the burden of proof to Camden, in excluding certain evidence and in failing to view evidence most favorably to Camden. According to Camden, the trial court's comments during argument at the summary judgment hearing showed, or at least gave rise to the inference, that triable issues of material fact existed. As we explain more fully below, the dearth of relevant cogent arguments on many of the claims raised presents a barrier to meaningful review of their merits.

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[7] Code of Civil Procedure section 437c, subdivision (g), provides in part: "Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists."

1. Standard of Review

Code of Civil Procedure section 437c, subdivision (c), specifies that granting a motion for summary judgment is merited only if all of the admissible evidence submitted by the parties shows there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the [summary judgment] motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.)

We review a summary judgment de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We independently determine if summary judgment is merited based upon the record before us. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) We review the trial court's ruling, not its rationale. (*Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.) Generally, just as the trial court is required to do, we must "'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843; see Code Civ. Proc., § 437c, subd. (c).) "'In performing our de novo review, we view the evidence in the light most favorable to plaintiff[ ]' [citation], and we 'liberally construe' plaintiff's evidence and 'strictly scrutinize' that of defendant 'in order to resolve any evidentiary doubts or ambiguities in [plaintiff's] favor.' [Citation.]" (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.)

Our de novo review, however, differs in one respect from the comprehensive evaluation the trial court must make. Our review "is limited to issues which have been adequately raised and supported in [the appellant's] brief." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; see also *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1016, fn. 5.) We are "'not required to make an independent, unassisted study of the record in

search of error,'" develop an appellant's argument for him or her or otherwise act as counsel for him or her. (*Guthrey v. State of California*, *supra*, 63 Cal.App.4th at pp. 1115-1116.) We may summarily reject an appellant's contention for failure to provide adequate briefing.[8] (*Id.* at p. 1116.) "The absence of cogent legal argument or citation to authority allows this court to treat the contentions as [forfeited]. [Citations.]" (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.) We will address only "those arguments that are sufficiently developed to be cognizable. To the extent [an appellant] perfunctorily asserts other claims, without development and, indeed, without a clear indication that they are intended to be discrete contentions, they are not properly made, and are rejected on that basis." (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

2. Specific Causes of Action

In its opening brief, Camden refers to facts related to the eight events alleged in the complaint, but it presents conclusory statements rather than cogent arguments as to why the referenced facts constitute triable issues of material facts and how they prove an element of one or more of the causes of action.[9] Much of the material Camden cites in

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[8] Each party's brief must "support each point by argument and, if possible, by citation of authority" (Cal. Rules of Court, rule 8.204(a)(1)(B)) and "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears" (Cal. Rules of Court, rule 8.204(a)(1)(C)).

[9] The following summarizes some of Camden's statements purporting to identify triable issues of material fact: (1) Oracle refused to allow Camden to sell renewals after January 2009 even though there was evidence the contract had not expired. (2) That the term of the contract was a disputed material fact was shown by the statements by Camden's principal and the conflicting testimony by Oracle's employee, Viktor Cox, and by Sanders that Camden had the right to sell the software in subsequent years. (3) Cox's indication that "'he did not make the policies'" as to why Camden would not be paid for selling prepaid software support was evidence of breach of contract. (4) The trial court's comment that "there apparently was a delay due to who knows what" is evidence of a triable issue as to "who knows what." (5) The trial court's comments showed that the

the record as support does not qualify as admissible evidence (e.g., a question or comment by the trial court during argument; information in declarations which the court excluded as inadmissible).

In its opening brief, Camden raises claims challenging the grant of summary judgment with respect to only one of Camden's causes of action, the first cause of action for breach of contract. Camden does not do so with respect to its second, fourth, fifth or sixth causes of action. Rather, Camden attempts to present claims and arguments as to these causes of action, as well as to the first cause of action, by requesting us to consider its arguments made in papers submitted to the trial court in its opposition to the motion for summary judgment and amended separate statement of disputed facts. Such an incorporation by reference does not satisfy the requirement of California Rules of Court rule 8.204(a)(1)(B) that the party's appellate brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority." (*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 290.) We need not consider such arguments incorporated by reference (*id.* at p. 291), and we decline to do so here. Camden having not otherwise adequately raised issues concerning the grant of summary judgment as to the second, fourth, fifth and sixth causes of action, we deem any and all issues with respect to these causes of action to be forfeited. (*In re Marriage of Falcone & Fyke*, *supra*, 164 Cal.App.4th at p. 830; *Reyes v. Kosha*, *supra*, 65 Cal.App.4th at p. 466, fn. 6; *Guthrey v. State of California*, *supra*, 63 Cal.App.4th at pp. 1115-1116.) With respect to the first cause of action, we deem all issues forfeited except those adequately raised in Camden's opening brief.

We turn to contentions Camden raised in its opening brief with respect to its first cause of action for breach of contract. To state a cause of action for breach of contract,

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court "found an inference or a triable issue of fact by the alleged interference by [Oracle] preventing [Camden's] use of an online ordering system called 'OARS' discussed in" the declarations of two of Camden's witnesses.

Camden needed to establish "the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant and damages." (*First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 745.) It is undisputed that contracts existed between the parties. They were the written VAR agreements in 2004 and 2008 and the "click wrap" agreements in the intervening period.

In its opening brief, Camden fails to present a cognizable argument as to how defendants breached the contracts. As defendants point out, Camden failed to identify any specific contract terms allegedly breached in its complaint, its discovery responses[10] and its opening brief on appeal. In the complaint, Camden alleged only that "[f]rom January 24, 2007, through present, [defendant] breached the [VAR] Agreement" and incorporated by reference the eight instances alleged in the general allegations as constituting breaches of contract. This deficiency tainted the purported evidence necessary to establish one or more elements of each remaining cause of action. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as [forfeited]. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785, citing *People v. Stanley*, *supra*, 10 Cal.4th at p. 793.) Accordingly, we deem Camden's contentions regarding its breach of contract cause of action to be forfeited.

3. Shifting Burden of Proof

Next, Camden claims that the trial court improperly shifted the burden of proof to Camden to show by a preponderance of the evidence that there was a triable issue of

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10 For example, in September 2008, defendants submitted their first set of special interrogatories to Camden. Number 30 asked that Camden identify each specific term of the VAR agreement at issue in the complaint that Camden claimed defendants breached. Camden submitted its response in October 2008 (first response), its further response in December 2008 (second response) and its court-ordered further response in March 2009 (third response). None of Camden's responses over the six-month period identified any specific term of any specific agreement that was allegedly breached.

material fact. Camden quotes the trial court's statement to Camden's counsel: "You haven't shown by a preponderance of the evidence there is something to try to a jury."

It is established that "[w]hen the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence.' [Citation.]" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) The moving defendant need not conclusively negate an element of the plaintiff's cause of action. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 853.) However, the defendant may "not simply point out" the absence of evidence supporting the plaintiff's claim, but must present evidence in support of his or her motion. (*Id.* at pp. 854-855, fn. omitted.)

If the moving defendant carries his initial burden of production, "he causes a shift, and the opposing [plaintiff] is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 850-851.)

In support of its contention, Camden makes the conclusory assertion that the "record does not show that [Oracle] met its initial burden of producing evidence as described by Code of Civil Procedure section 437c, subdivisions (a), (f)(1) and (o)(2)." Camden then asserts that defendants' separate statement "contained essentially 'argument' so summary judgment should not have been granted." Presumably as supporting authority, Camden cited *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, but specified no point page. In addition, Camden claims that the trial court "put the horse before the cart," as indicated by the court's statement that what was needed was evidence that defendants did something wrongful, in that defendants may

have prevented Camden from doing business by lawful means which were "not in violation of any contract or law."

In support of its claims, however, Camden presents only conclusory statements, without further explanation or argument supported by citation to the record or legal authority. There is, for example, no citation to or quotation of any specific portion of defendants' separate statement as being "argument," rather than "fact," and there is no explanation as to why such cited or quoted portion qualifies only as "argument." Camden does not, for example, explain how its "horse before the cart" claim or its claim defendants did not meet their "initial burden of producing evidence" relate to the application of legal standards for the burden of persuasion, production or proof of the moving and opposing parties in summary judgment proceedings to facts from the record.[11]

While conclusory statements may be appropriate as allegations in a complaint, more is required to meet an appellant's burden on appeal. (Cal. Rules of Court, rule 8.204(a)(1)(B) & (C); *Guthrey v. State of California*, *supra*, 63 Cal.App.4th at pp. 1115-1116.) Having offered only conclusory statements, unsupported by citations to the record or to legal authority, Camden forfeited its claim of error by the trial court with

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11 Even if the issue were not deemed forfeited, defendants met their burden in the instant case and the burden properly shifted to Camden. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) As we previously explained in footnote 10, *ante*, defendants presented evidence that after defendants' extensive discovery efforts, Camden's interrogatory answers contained no facts specifically identifying any portion of any contract allegedly breached by defendants. It has been held that a trial court could find that the defendant met its burden of producing evidence by showing that the plaintiffs' interrogatory answers contained no fact supporting an element of a cause of action. (*Scheiding v. Dinwiddie Construction Co.*, *supra*, 69 Cal.App.4th at p. 76.) The rationale was that the trial court could "infer[] from the plaintiffs' discovery answers that there was no further evidence available to oppose the motion." (*Ibid.*) Defendants also provided additional discovery responses and deposition testimony demonstrating that Camden's allegations in the complaint lacked merit. Further, defendants affirmatively denied liability.

respect to shifting the burden of proof. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)

Camden next contends summary judgment was not warranted, in that the trial court stated, "or at least inferred," that triable issues of fact existed. Camden argues that the trial court's discussion of certain issues during the summary judgment hearing showed the court's knowledge of the existence of triable issues of material facts. We disagree. The trial court issued a detailed, 12-page written decision, delineating why no triable issues of material fact existed. This clarifies and supersedes any comment the trial court may have made during the argument of the summary judgment motion.

4. Exclusion of Evidence

Camden next contends that summary judgment should be reversed, in that the trial court eliminated some issues of triable fact by improperly excluding evidence. Camden claims the trial court "improperly ruled that almost all of [Camden's] Declarations were inadmissible hearsay or not relevant." Camden does not identify which declarations were improperly excluded. In other places in the opening brief, however, Camden asserts error in excluding the declarations of Matthew H. Reaves and Kevin Dunn and an email from a third party attached to the declaration of Anna Cesar. We disagree that the summary judgment should be reversed based upon the exclusion of this evidence.

We review a trial court's evidentiary ruling for abuse of discretion and will not overturn the ruling absent a clear abuse of discretion. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.) "'[T]he court's ruling will be upset only if there is a clear showing of an abuse of discretion.' [Citation.] '"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citation.]' [Citation.] Moreover, even where evidence is improperly excluded, the error is not reversible unless '"it is reasonably probable a result more favorable to the appellant

would have been reached absent the error. [Citations.]" [Citation.]' [Citations.]" (*Id.* at pp. 1431-1432.)

The email attached to the Cesar declaration was from Camden's customer, Kennan Associates. Plaintiff claims that the email showed that Oracle refused to allow Camden to sell to Kennan Associates in January 2009 but would allow such sales in subsequent years. Camden asserts that the email is evidence that a triable issue of fact existed regarding whether Oracle's action was wrongful. However, Camden fails to explain how the email shows that any action was wrongful. The court excluded the email as inadmissible hearsay. Camden asserts that the trial court's comments indicated that the business record exception applied, but Camden does not provide supporting argument or citation to legal authority. As a statement attributed to a third party who was not a sworn declarant and which was in an unauthenticated document, the email constituted inadmissible hearsay. (Evid. Code, §§ 1200, 1271; see also Evid. Code, § 1401.)

The trial court properly ruled that most portions of the declaration of Kevin Dunn, a former employee of defendant, were irrelevant. (Evid. Code, § 350.) Camden offered the Dunn declaration as evidence that Oracle's manager told Oracle's employee not to respond to Camden or send Camden any more leads. The Dunn declaration states that the directive not to respond was with respect to only one particular deal. Camden makes no effort to explain why such an employee directive is relevant to breach of any contract or any other cause of action.

In his declaration, Matthew H. Reaves stated that he made his "statement to the best of my knowledge and recollection." That deficiency is sufficient reason to exclude the entire declaration. A declaration "based upon the best of my knowledge" is "insufficient to establish the personal knowledge required by [Code of Civil Procedure] section 437c." (*Ahrens v. Superior Court* (1988) 197 Cal.App.3d 1134, 1151, fn. 13; see Code Civ. Proc., § 437c, subd. (d).) This is consistent with Evidence Code section 702, which provides that a witness's testimony is inadmissible "unless he has personal knowledge of the matter." The Reaves declaration was also undated and, therefore, failed

to comply with statutory requirements for a valid declaration. (Code Civ. Proc., § 2015.5.) A declaration which fails to comply with statutory formalities, such as an undated declaration, should not be considered by the trial court in summary judgment proceedings. (*Baron v. Mare* (1975) 47 Cal.App.3d 304, 308.) For the foregoing reasons, we conclude that the trial court did not abuse its discretion in excluding the Reaves declaration, most of the Nunn declaration and the email exhibit to the Cesar declaration.

D. *Defendants' Motion to Strike Plaintiff's Reply Brief*

Defendants filed a motion to strike Camden's reply brief on appeal or, at a minimum, all of the new matter contained in Camden's reply brief. Issues raised by an appellant for the first time in his reply brief will ordinarily not be considered. (*Kovacevic v. Avalon at Eagles' Crossing Homeowners Assn.* (2010) 189 Cal.App.4th 677, 680, fn. 2.) An issue is new if it does more than elaborate on issues the appellant raised in his opening brief or rebut arguments made by the respondent in his reply brief. Fairness militates against allowing an appellant to raise an issue for the first time in his reply brief, in that consideration of the issue deprives the respondent of the opportunity to counter the appellant by raising opposing arguments about the new issue. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

Accordingly, we have not considered new matter Camden raised in its reply brief in reaching our decision. It is, therefore, unnecessary to strike any portion of Camden's reply brief. Defendants' motion is denied.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.