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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KWESI AMOAFO-YEBOAH, Plaintiff and Respondent, v. KOFI AMOAH et al., Defendants and Appellants.	B229771 (Los Angeles County Super. Ct. No. BC367991)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ricardo A. Torres, Judge. (Retired judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Klass, Helman & Ross and Robert M. Ross for Defendants and Appellants.

Schwartz & Asiedu and Kwasi A. Asiedu for Plaintiff and Respondent.

Defendants Kofi Amoah (Amoah) and Progeny Ventures, Inc. (Progeny) appeal judgment entered for plaintiff Kwesi Amoafo-Yeboah (Yeboah) after a bench trial in Yeboah's action to enforce the terms of a modified judgment. The modified judgment settled a prior action relating to commissions payable under numerous contracts arising from Progeny's business of finding money transfer agent banks in Africa for Western Union. On appeal, defendants principally contend that at a bench trial on his declaratory relief claim, Yeboah failed to establish the contracts referenced in the modified judgment were still in effect, and that the trial court erred in failing to conduct a jury trial on several of their legal claims. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Formation of Prodigy and the Money Transfer Agency Business

Amoah and Yeboah formed Progeny in the early 1990's.[1] Amoah was the chief executive officer, and Yeboah was the president. Progeny's business consisted of introducing Western Union's money transfer business to certain banks in Africa; those banks executed agency agreements with Western Union. To that end, Progeny was to act as an intermediary to introduce Western Union's international money transfer operations to six banks located in Africa: Agricultural Development Bank (ADB), First Bank of Nigeria (FBN), and four other banks (collectively Banks).[2] As a result of Progeny's efforts, the Banks entered into money transfer agency agreements with Western Union; at the same time the Banks separately agreed to share with Progeny their monthly agency commissions in a 60/40 ratio through what were known as collateral agreements.

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[1] Progeny was originally formed as a Delaware Corporation, but apparently was later incorporated as a California corporation.

[2] The four other Banks are Kenya Post Office Bank (KPOB), Commercial Bank of Eritrea (CBE), Commercial Bank of Ethiopia (CBE2), and Uganda Cooperative Bank (UCB). The collateral agreements pertaining to the four other Banks are not at issue in this appeal.

2. The Modified Judgment of April 28, 2000

In an action commenced in May 1996 (prior action), plaintiff asserted that defendant had converted all of the assets, stocks and properties of Progeny to himself. After extensive litigation of the prior action, the parties entered into two stipulations that became judgments; the second of which was a modified judgment filed April 28, 2000. Pursuant to the modified judgment, Yeboah was to receive 23.6 percent of the "Gross Proceeds" (as defined in the modified judgment) of the collateral agreements. The modified judgment further provided that Amoah became the sole owner of Prodigy, and also provided for annual accountings, dispute resolution over such accountings, and imposition of penalties and interest on defendant in the event of nonpayment of sums due plaintiff.[3]

Critical to this appeal is paragraph 5 of the modified judgment, which provided: "AMOAH, individually and for and on behalf of [PROGENY] . . . recognizing the contribution of [YEBOAH] in the transactions between [PROGENY] and the respective African financial institutions, have stipulated that *for so long as* [*PROGENY*]*continues to derive income from the specific WESTERN UNION Agency contracts described herein above, as amended, modified, or substituted, the parties shall distribute the benefits thereof in the proportions hereinafter set forth*." (Italics added.)

The modified judgment also provided that Progeny "shall have the right to take on other new and additional business activities and objects in addition to the Western Union business it inherited from Progeny, Inc. Delaware. . . . [¶] [The parties further agree] that the proceeds and benefits derived or to be derived from these other activities and objects shall not be part of the subject matter of this Modified Judgment, but shall be excluded completely from this Judgment and shall be wholly owned by and be the assets of [Progeny]." The modified judgment listed collateral agreements with six banks, including

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[3] A prior appeal from the modified judgment was dismissed because the modified judgment was interlocutory rather than final and hence not appealable. (*Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443.)

those collateral agreements with ADB and FBN, which "constitute[d] the subject matter of this Modified Judgment . . . ."[4]

3. The Second Amended Complaint

Plaintiff's operative second amended complaint (SAC) filed February 4, 2008 alleged claims for breach of contract, fraud, breach of fiduciary duty, unfair business practices, accounting, declaratory relief, and money had and received based upon its assertion that defendant Amoah had breached the modified judgment. The SAC alleged that the modified judgment was premised on the underlying collateral agreements which provided that as long as the Banks remained agents of Western Union and engaged in money transfer operations, the Banks would be obligated to pay Progeny 40 percent of the commissions they earned from Western Union. Plaintiff alleged the collateral agreements were "agreements in perpetuity" and did not expire; further, the modified judgment provided if such agreements were modified, substituted or otherwise amended, defendants' obligation to pay plaintiffs 23.6 percent of such commissions survived such amendments.

Trial of this action commenced on February 1, 2010 as a bench trial on Yeboah's declaratory relief claim. The court took testimony from the parties as well as admitted numerous documentary exhibits.

4. The ADB and FBN Agreements

The December 16, 1993 agency agreement between Western Union and ADB provided at paragraph 2, "Term," that "This Agreement shall continue for a period of two years from the date of this Agreement set forth above, subject to earlier termination as provided herein. In the event that either party gives notice of its intent to allow the Agreement to terminate six months prior to the expiration of the two year period, then this Agreement shall terminate at the end of the two year period. Otherwise, this Agreement

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[4] Amoah claimed at trial that the six Banks were listed not just for identification, but to evidence the parties' intent that the Modified Judgment would only apply to those agreements listed.

shall be automatically renewed for one year periods on the same terms and conditions as are contained herein subject to the right of either party to terminate at the end of any one year period upon a minimum of six months notice prior to the expiration of any one year term. This Agreement may be terminated at any time upon the mutual written agreement of the parties." The agency agreement would "terminate automatically if Western Union discontinues the [money transfer] Service as a whole for any reason." The agency agreement was amended to provide that the agreement would "continue for a period of July 1, 1998 to June 30, 2002, subject to any termination rights set forth in the Agreement."

The December 16, 1993 collateral agreement between Progeny and ADB provided that it "shall, subject to same being reviewable upon 30 days notice given by either party, continue and be renewed automatically with the continued existence and renewal of the Agency Agreement between ADB and Western Union referred to above. This agreement can only be amended in writing by [Progeny] and ADB, and shall continue contemporaneously with the Agency Agreement between ADB and Western Union."

The August 15, 1995 agency agreement between Western Union and FBN contained the same term (two years with one-year renewals) as the agency agreement between Western Union and ADB. The agency agreement contained an exclusivity provision that prohibited the Bank from acting as an agent for another public money transfer service during the term of the agreement and for one year after its termination.

The August 15, 1995 collateral agreement between Progeny and FBN provided that it "shall continue and be renewed automatically with the continued existence and renewal of the Agency Agreement between FBN and Western Union." The collateral agreement would terminate automatically if Western Union discontinued the money transfer service as a whole for any reason. The collateral agreement with FBN was amended twice, on August 15, 1995 and on January 1, 1998.

5. Amoah's Offer to Yeboah

Sometime in the mid-1990's, Amoah offered to buy out Yeboah for $1 million. Yeboah counter-offered $2 million, but Amoah took the corporate documents and walked away. As a result, Yeboah filed the action that resulted in the modified judgment.

6. The Termination of the ADB and FBN Agency Agreements

(a) ADB

On December 21, 2001, Western Union wrote to ADB and confirmed that "the [Agency] Agreement is due to expire on June 30, 2002," and informed ADB that while Western Union wished "to sign a new long-term agreement with [ADB], Western Union intends to terminate the [Agency] Agreement as it presently exists. [¶] . . . [¶] We take this action because Western Union has, over the years, made several changes to our Representation Agreement, and administrative and operational efficiency require us to ask all our agents to sign the same basic form. We would like to forward to you a draft of our new agreement for your consideration."

James Abador,[5] an attorney for ADB, testified that Western Union told them the agency agreement would be terminated. While ADB and Western Union engaged in negotiations for a new agreement, they did not cease doing business together. The new contract provided that it superseded the prior agency agreement, and was effective as of July 1, 2002. It did not provide for exclusivity for ADB.

On June 10, 2002, ADB informed Progeny that Western Union had exercised its right to terminate the agency agreement; therefore, the collateral agreement with Progeny would not be renewed. During the period July 1, 2002 until November 12, 2003, there was no collateral agreement with Progeny, and no commissions were paid. On June 13, 2003, ADB wrote a letter to Progeny confirming that the collateral agreement had been terminated when the Western Union agency agreement terminated, and that ADB and Progeny had not made a new agreement. On August 28, 2003, Abador wrote to Progeny

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[5] His name is spelled Agbedor in other places in the record.

on behalf of ADB and informed it that "[t]he 1993 Agreement with [Progeny] was to run contemporaneously with the Bank's Representation Agreement with Western Union. As you are no doubt aware, the Representation Agreement with Western Union was terminated and a new Agreement executed between the Bank and Western Union."

On November 12, 2003, Progeny and ADB entered into a new agreement whereby the parties terminated the December 16, 1993 collateral agreement; the parties agreed to execute a new agreement for collaboration and cooperation under the new agency agreement with Western Union dated July 1, 2002; and the commission due Progeny was revised downward. The new agreement no longer contained an exclusivity provision. Amoah took the position at trial that when the agency agreement with Western Union terminated, the collateral agreement terminated. "It [the November 12, 2003 agreement] was a new agreement. The terms are different. Commissions are different. Environment had totally changed. I presented a brand-new proposal, a new model for doing the business." Indeed, the competitive environment had changed and Progeny had to work harder to insure the Western Union money transfers went to it, rather than its competitors.

Yeboah testified that sometime in 2002, Amoah told him that the ADB collateral agreement had terminated, and by 2003 he was no longer receiving commissions. Yeboah believed the collateral agreements would renew with the agency agreements. Amoah testified Progeny did not receive its commissions while the new agreement was being negotiated, but Progeny later received some monies from ADB. After June 2007, Progeny did not receive any more commissions from ADB.

(b) FBN

On January 1, 1998, Western Union and FBN amended the agency agreement, extending it until December 31, 2002. The amended agency agreement was replaced with a new agency agreement effective January 1, 2003 that had a term of five years. Christy Okoye of FBN testified at trial that although the agency agreement had terminated, ADB and Western Union continued to do business. Both Okoye and Amoah maintained that the collateral agreement expired when the agency agreement with Western Union expired.

On January 1, 1998, FBN and Progeny also executed a new collateral agreement, which provided that its term would renew automatically: "This Agreement shall continue and be renewed automatically with the continued existence, modification, and/or renewal of the Agency Agreement between FBN and Western Union. This Agreement can only be amended in writing by [Progeny] and FBN, and shall continue contemporaneously with the Agency Agreement between FBN and Western Union."

On February 20, 2003, Okoye wrote Progeny stated that the contract had expired; at that time, FBN stopped making payments to Progeny. After the agency agreement expired on December 31, 2002, it took 17 months to negotiate a new collateral agreement with Progeny. This new collateral agreement, after much negotiation due to changed business conditions, was made in November 2004, with an effective date retroactive to March 1, 2003. Okoye testified negotiations were difficult because "[FBN] was not ready to go into any further contracts with [Progeny]. And everything I'm saying here is—I'm being very honest about it. . . . We didn't see any value to continue. Exclusivity right was off. Commission was reduced. So we had no business working with [Progeny]. [¶] . . . [¶] So it took us that number of months to be able to draft and structure a new contract. And [Amoah] needed to go back to the drawing board to come up with a lot of strategies to show [FBN] . . . any value that we could get from the relationship." Okoye further testified the provisions of the new agreement were vastly different. "The duties and responsibilities were entirely different. . . . So we had a situation where we had to redraft and listed all the things that . . . must be taken into consideration." Further, the commission was reduced. During the negotiation period, ADB made no payments to Progeny.

Sometime in 2002, Amoah told Yeboah that the ADB and FBN agency agreements had terminated. By 2003 Yeboah was no longer receiving commissions, and he learned in 2005 from an ADB official and from reading the "African Times" that Amoah and Progeny were still in the money transfer business with Western Union.

A forensic accountant testified at trial that FBN paid Progeny $8,732,448 as commissions during the period January 1, 1996 through July 1999.

7. *Trial Court Ruling*[6]

(a) Request for Jury

During the pretrial phase, both parties asserted the matter would be tried before a jury. Discovery cut-off was October 23, 2009 and trial was set for February 1, 2010. On November 12, 2009, defendants deposited jury fees with the trial court. On January 13, 2010, defendant filed proposed jury instructions; on January 15, 2010, plaintiff filed proposed jury instructions. Defendants' motion in limine No. 1, filed January 19, 2010, requested a bifurcation of the legal and equitable issues, with a trial of the equitable causes of action first (unfair business practices, accounting, declaratory relief). On January 27, 2010, defendants briefed their right to a jury trial.

On the day trial was set to commence before Judge Palazuelos, the court informed them the case would be transferred to another judge. Defendants told the court that there were two declaratory relief claims, the first being whether the contracts at issue were amendments, modifications, or substitutions; the second was whether the modified judgment applied to those contracts. The court agreed it was a two-part analysis, with a jury trial to follow the declaratory relief claims, but that the court would leave the matter to the new judge.

At the outset of trial before the new judge, Judge Torres, the court stated with respect to another motion in limine brought by defendants to limit evidence at trial to those matters occurring before the modified judgment, "We're not in a jury trial. We're in a court trial" and thus the motion in limine was of no consequence. Defendants

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[6] The issue of whether the matter should be tried to the court on the equitable claims or in a jury trial arose at the outset of trial, and was argued persistently by defendants during trial, in a motion for directed verdict, in a motion for mistrial, and while the trial court announced its ruling. As this issue is intertwined with the court's ruling on substantive matters, we set forth the countervailing contentions together for clarity.

continued to argue throughout the bench trial they were entitled to a jury trial. Judge Torres denied the requests. Indeed, the court stated numerous times during trial that it did not find the documents, including the modified judgment, to be ambiguous.

(b) Motion for Directed Verdict

After the presentation of Yeboah's case, defendants moved for a directed verdict, arguing that the documents admitted at trial established as a matter of law the collateral agreement terminated in June and December 2002, and that the new agreements entered into between Progeny on the one hand and ADB and FBN on the other were not encompassed by the modified judgment because they were not "modifications, amendments, or substitutions."

The court denied the motion, finding the collateral agreement between ADB and Progeny, which stated, "This Agreement can only be amended in writing by [Progeny] and ADB and shall continue contemporaneously with the agency agreement between ADB and Western Union," did not state it was limited to the existing agreement, rather, it stated that, in the court's words, "anytime the money transfer business continues, [the collateral agreement] follows along with it." The court found that although the underlying agency agreements terminated, the "money transfer business continued right on through," and Western Union kept paying monies due, as set forth in Exhibit 119. The court referenced paragraph 5 of the modified judgment which stated that as long as Progeny continued to derive income from any Western Union contracts (and not merely the contracts enumerated in the modified judgment), the parties would distribute the benefits thereof. The court stated that "it's common, with [this] type of situation[], the effort is expended in the beginning in creating the business. And then flows, sometimes, the rewards of creating the business. . . . [Later], you just reap the rewards."

Defendants moved for a clarification of the court's ruling on the directed verdict, and defendants reiterated that they requested a jury trial because the court was not relying on the four corners of the documents, but was instead taking extrinsic evidence. The court responded that it had not denied defendants a jury trial because it had relied solely

on the language in the Modified Judgment, and that it did not find anything ambiguous in the documents.

Trial resumed. At the conclusion of defendants' case, the court stated that defendants had argued "on the motion for nonsuit . . . in regards for breach of contract. I did make comments in regards to the fraud, but I didn't rule on it. I don't think I made any comments in regards to breach of fiduciary duty, unfair business practices. And there was some evidence put on in regards to accounting in regards to the audit report . . . . But now I'm going to rule on the [SAC]. Some of these [claims] are equitable, but it doesn't make any difference because it's all a court trial . . . ." In response to a question whether the court had bifurcated the trial, the court stated, "I don't bifurcate a case when it's a court trial. If it was a jury trial, I would have bifurcated the equitable, which is for the court, as opposed to the other causes of action that go to the jury. But since I ruled that there wasn't any factual issues to be decided, it's all contract interpretation. . . . [¶] . . . [¶] However, I don't know exactly what you're asking for in the breach of contract. If it's anything other than commissions, . . . then I want to hear it."

Yeboah responded, "obviously, with respect to the declaratory relief that was sought with respect to the interpretation of the modified judgment that, in fact, everyone agreed was basically appropriate for a court trial." The court then referenced Judge Palazuelos's minute order of February 1, 2010, which stated that the nature of the proceedings was a jury trial, and transferred the case to a different judge. "And [the case didn't come] bifurcated. . . . And we discussed a jury trial. And I said, no, there's no jury trial."

The court stated that it interpreted the proceedings to have covered the breach of contract claim: "I interpret the—what we did as a breach of contract. But if you say, no, it's not a breach of contract, it's declaratory relief, that's fine because what you're talking about is the breach of contract of the modified judgment, is what I thought it was, as we proceeded here. If you want to call it declaratory relief, that's fine. [¶] But as far as I was concerned, I thought we were talking about breach of contract because you're talking

about the modified judgment that you didn't get—that you were entitled to under the modified judgment. [¶] Be that as it may, you can argue whatever you want. But the whole case has been heard as far as I am concerned. There isn't anything bifurcated or left to do." The court reiterated that during trial, it only heard evidence on questions of law. "Now, if you want to proceed on any questions of fact and you want a jury trial on that, that's something different. But if you can—but you have to tell me what question of fact you have for a jury. And I mean if you have them, I'll give you a jury trial. But I've—but I've ruled on the contract interpretation and what that causes. [¶] If you don't want to call it a breach of contract, but you want to call it declaratory relief, that's fine with the Court. I don't care what you do." The court stated that it had not heard any evidence on the fraud cause of action, and that the parties would have to put on evidence for the fraud claim, and the parties could have a jury trial on the unfair business practices claim. "I thought this [the trial just held] pretty much resolved your whole case." The court returned its attention to the transfer of the case from Judge Palazuelos, and stated the case was transferred as a jury trial on a breach of contract claim, and did not come for a trial on declaratory relief.

Defendants asked for a statement of decision, to which the court responded, "The findings aren't going to change any different from what I said yesterday at the motion for nonsuit because I've heard nothing else since then." Defendants complained that there was no evidence for them to put on because the court stated it was solely relying on the documents, and asked for specific findings whether the new contracts were modifications, substitutions, or amendments. The court responded that its ruling was clear.

(c) Yeboah's Dismissal of Legal Claims

Yeboah then offered to dismiss the fraud, breach of fiduciary, and the unfair business causes of action, and retain the breach of contract and other equitable causes of action. The court reiterated that there were no questions of fact on the breach of contract claim, stating, "the Court has ruled [the modified judgment] has been breached" and questioned why Yeboah would dismiss the breach of contract claim. The court concluded

that it had "in effect" found a breach of contract, that Yeboah was entitled to 23.6 percent of the contract, and that an accounting would be ordered.[7]

(d) Defendants' Motion for Mistrial

Defendants moved for a mistrial, arguing that defendants were entitled to a jury trial. While acknowledging that the court could interpret the contract without regard to extrinsic evidence, when it relied on extrinsic evidence, it became a trier of fact; when the court became a trier of fact, defendants had a right to a jury trial. Defendants pointed to the fact the court relied on extrinsic evidence in making its ruling. The court asserted that the evidence given was "historical" and denied the motion.

(e) Counsel's Argument and Court's Ruling

Defendants again argued that they were entitled to a jury trial because it was a question of fact whether the collateral agreement and agency agreements terminated or whether the new collateral agreements were merely modifications, substitutions or amendments of the original agreements listed in the modified judgment. Counsel further argued that whether a claim is styled as a declaratory relief claim is not dispositive on whether a jury trial is required.

The court stated that at the outset, the case came to it for a jury trial; the court determined at the outset everything was related to the modified judgment; after consulting with the parties, that there was no question of fact to be presented to a jury regarding breach of contract; and because no evidence was presented on the legal claims, the legal causes of action (except for breach of contract) were dismissed. The court found breach of contract, and entitlement to an accounting and declaratory relief. The court concluded there were no ambiguities in the modified judgment, that the parties were talking about the revenue stream from Western Union when they made the modified judgment, and that

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[7] The record indicates that although Yeboah offered to dismiss certain of the claims, he did not do so, and the judgment in this case (as modified) encompassed all of the claims pleaded in the SAC.

the parties knew the collateral agreements and agency agreements would not last in perpetuity even though they had specific termination dates.

The matter was referred to an accounting referee to determine the amount of commissions due, and on November 12, 2010, the court entered its judgment in favor of Yeboah in the amount of $4,525,883, plus attorney fees and costs of suit.[8]

DISCUSSION

Defendants contend that the trial court erred in (1) failing to grant their motion for a directed verdict because Yeboah failed to establish the contracts referenced in the modified judgment were still in effect; (2) finding the modified judgment encompassed the later-negotiated collateral agreements with ADB and FBN; and (3) failing to conduct a jury trial because the interpretation of the modified judgment required factual findings. We conclude that the trial court did not improperly deny defendant a jury trial.

Defendants contend they were entitled to a jury trial because the interpretation of the modified judgment required a factual determination regarding whether the new contracts constituted substitutions, amendments, or modifications of the contracts identified in the modified judgment. Plaintiff argues that the interpretation of a judgment is solely a judicial function, defendants were not entitled to a jury trial on the issue tried because it was strictly an equitable issue, and there was no extrinsic evidence to consider.

A. Right to Jury Trial

Article I, section 16 of the California Constitution guarantees the right of a jury trial.[9] Additionally, Code of Civil Procedure section 592 provides, "[i]n actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an

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[8] The judgment was later modified nunc pro tunc to include an award of attorney fees and costs to Yeboah.

[9] Article I, section 16 of the California Constitution provides in relevant part: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. . . . In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute."

issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the Court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code." Trial by jury is "'an inviolate right,'" "'a basic and fundamental part of our system of jurisprudence. . . . As such, it should be zealously guarded by the courts. . . . In case of doubt therefore, the issue should be resolved in favor of preserving a litigant's right to trial by jury.' [Citations.]" (*Cohill v. Nationwide Auto Service* (1993) 16 Cal.App.4th 696, 699.)

Although a jury trial is a matter of right in a civil action at law, it is not in an action at equity. (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8.) The constitutional right to a jury trial is the right as it existed a common law, which is a purely historical question. (*Id.* at p. 8.) Thus, in "'"'determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the *gist* of the action. A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law."' [Citation.] On the other hand, if the action is essentially one in equity and the relief sought 'depends upon the application of equitable doctrines,' the parties are not entitled to a jury trial." (*Id.* at p. 9.) If relief was historically only available in equity, then there is no right to a jury trial. Thus, a complaint that purports to seek recovery of damages for breach of contract, in form an action at law in which a right to jury trial ordinarily would exist, but which seeks relief which was available only in equity, namely, the enforcement of a contract through application of the equitable doctrine of promissory estoppel, is an action in equity and there is no right jury trial. (*Ibid*.) On the other hand, if equitable principles are applied in an action at law, it remains an action at law. (*Id.* at p. 10.)

The pleadings are not conclusive on the issue of whether an action is legal or equitable. (*C & K Engineering Contractors v. Amber Steel Co.*, *supra*, 23 Cal.3d at

p. 10.) Relevant here, a declaratory relief action is equitable in nature (*Brennan v. Superior Court* (1994) 30 Cal.App.4th 454, 459) while a breach of contract action is a legal action. (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671.) Nonetheless, in some cases, a cause of action may raise both legal and equitable issues. If the court can separate the legal and equitable issues, separate trials may be held on them. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1242–1244.) However, if the issues are intertwined and not severable, the right to a jury is determined by applying the "*gist* of the action" test. (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 622–623.) In *Unilogic*, the plaintiff sued for conversion and misappropriation of trade secrets, which are actions at law; the defendant asserted the equitable defense of unclean hands. *Unilogic* held the case was properly submitted to the jury because the defense was intertwined with the plaintiff's claims. (*Id.* at pp. 622–623.)

A related concept is where a claim may be styled as a cause of action for "declaratory relief," but is in fact a substitute for a breach of contract claim; in such case, a party may assert the right to a jury trial. (See, e.g., *Caira v. Offner* (2005) 126 Cal.App.4th 12, 25–26; *California Casualty Indemnity Exchange v. Frerichs* (1999) 74 Cal.App.4th 1446, 1450.) "'[I]f the issues of fact arising would have been triable by a jury as of right in an action which might have been substituted for the declaratory judgment action by either party, then there is a right to jury trial on such issues.'" (*State Farm ETC. Ins. Co. v. Superior Court* (1956) 47 Cal.2d 428, 431.)

Denial of the right to a jury trial where one is constitutionally mandated is both reversible error and an act in excess of jurisdiction. (*Olivia N. v. National Broadcasting Co.* (1977) 74 Cal.App.3d 383, 389; *Robinson v. Puls* (1946) 28 Cal.2d 664, 667.)

B. Defendants Were Not Entitled to a Jury Trial on the Declaratory Relief Claim

Here, we conclude that the trial court correctly interpreted the contracts at issue and ruled that the modified judgment was not ambiguous and the new collateral agreements were encompassed by paragraph 5 of the modified judgment as being modifications, substitutions, or amendments of the previous ADB and FBN contracts.

Further, the court's admission of extrinsic evidence did not convert the matter into one that required a jury trial; rather, the admission of extrinsic evidence was proper and necessary to the court's equitable determination of the meaning of the documents at issue. Finally, the court did not err in conducting a bench trial on all claims because determination of the declaratory relief claim was required before the breach of contract claim could be resolved and the resolution of the declaratory relief claim simultaneously resolved the breach of contract claim.

1. Declaratory Relief

Code of Civil Procedure section 1060 provides in relevant part: "Any person interested under a written instrument . . . , or under a contract, or who desires a declaration of his or her rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract." Declaratory relief operates prospectively, serving to set controversies at rest before obligations are repudiated, rights are invaded or wrongs are committed. Thus the remedy is to be used to advance preventive justice, to declare rather than execute rights. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 360.) Declaratory relief serves a practical purpose in stabilizing an uncertain or disputed legal relation, thereby defusing doubts which might otherwise lead to subsequent litigation. (*Ibid.*) Resort to declaratory relief therefore is appropriate to attain judicial clarification of the parties' rights and obligations under the applicable law. (*Id.* at p. 362.)

In ruling on a declaratory relief claim, the court may take evidence to resolve disputed factual issues, and need not submit such issues to a jury. (*Howard v. Howard* (1955) 131 Cal.App.2d 308, 313.)

2. Interpretation of Contracts

"[A] declaratory relief action is the appropriate vehicle for resolving disputes involving the contested meaning of contractual language." (*George F. Hillenbrand, Inc.*

v. Insurance Co. of North America (2002) 104 Cal.App.4th 784, 802.) We review the salient principles with respect to contract interpretation. Where the language of a writing is unambiguous, its interpretation is solely a judicial function, with the threshold question of ambiguity also a question of law. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *Appelton v. Waessil* (1994) 27 Cal.App.4th 551, 554–555.) We must interpret the contract to give effect to the mutual intention of the parties to the extent such intention can be ascertained from the written provisions of the contract. (Civ. Code, § 1636; *Thompson v. Miller* (2003) 112 Cal.App.4th 327, 335.) With respect to that intent, it is the objective intent of the parties as evidenced by the words of the contract that control. (*Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 54–55.) Whenever possible the whole of a contract is to be read so that each clause helps to interpret the other and give effect to every part thereof. (Civ. Code, § 1641; *Bear Creek Planning Committee v. Ferwerda* (2011) 193 Cal.App.4th 1178, 1183.) ‘“‘“‘Language in a contract must be construed in the context of the instrument as a whole, [under] the circumstances of [the] case, and cannot be found to be ambiguous in the abstract.’”’”’ (*Nava v. Mercury Casualty Co.* (2004) 118 Cal.App.4th 803, 805.) Finally, we consider the circumstances under which the agreement was made, including its object, nature and subject matter. (Civ. Code, § 1647; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 800.)

However, where a contract is susceptible to two or more meanings, each of which is plausible it is ambiguous; in the case of ambiguity, a party is entitled to introduce extrinsic evidence to aid the interpretation of the contract. (*Nava v. Mercury Casualty Co.*, *supra*, 118 Cal.App.4th at p. 805; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1140–1141.) Where the interpretation of a contract turns on the credibility of conflicting extrinsic evidence, it is for the trier of fact to determine the meaning of language in the contract. (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912–913.) Thus, “[i]nterpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no

conflict in the extrinsic evidence, or when a determination was made based on incompetent evidence." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.) Here, we review the trial court's interpretation of the modified judgment and collateral agreements de novo because the parties did not dispute the existence or terms of the new collateral agreements, but only disputed whether such agreements were covered by the modified judgment. (*Southern Pacific Land Co. v. Westlake Farms, Inc.* (1987) 188 Cal.App.3d 807, 817.)

3. Interpretation of the Modified Judgment

Here, the parties asserted the modified judgment was ambiguous based on what they claimed were two mutually exclusive provisions. Relying on paragraph 8, the defendants took the position the modified judgment referred solely to those collateral agreements in existence at the time of its execution (i.e., those listed in the modified judgment), and did not cover the collateral agreements with FBN and ADB because those contracts had terminated. Relying on paragraph 5, plaintiff took the position the modified judgment encompassed any after-executed collateral agreement relating to Western Union's money transfer business in Africa where the Western Union agreement with the Banks originated from Progeny's introduction, and thus that the new collateral agreements were modifications, substitutions, or amendments of the contracts listed in the modified judgment.

Although these two paragraphs of the modified agreement appear to be contradictory, they are not. "An agreement is not ambiguous merely because the parties . . . disagree about its meaning. Taken in context, words still matter. As Justice Baxter has pointed out, 'written agreements whose language appears clear in the context of the parties' dispute are not open to claims of "latent" ambiguity.'" (*Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 356.) The trial court was correct here in finding the modified judgment was unambiguous, and in finding that the purpose of paragraph 5 was to ensure plaintiff the continued income stream from the development of the business by covering any contract that would flow from that development because paragraph 5

provided "for so long as [PROGENY] continues to derive income from the specific WESTERN UNION Agency contracts described herein . . . , as amended, modified, or substituted, the parties shall distribute the benefits thereof . . . ." The use of the terms amended, modified, or *substituted* specifically indicates the parties intended that such contracts would from time to time be replaced with other contracts as the business evolved. Thus, the new collateral agreements, which involved the same type of business (acting as agent for Western Union under the agency agreement) and from which Progeny derived income, were within the scope of paragraph 5 of the modified judgment.

Furthermore, paragraph 8, which gave Progeny (as now controlled by defendants) the right to take on "other new and additional business activities and objects *in addition to the WESTERN UNION* business" (italics added) did not cover the new collateral agreements that defendants negotiated. Those collateral agreements were not "new and additional business activities" that were "in addition to" Progeny's original Western Union business; those agreements were substitutions for the agreements enumerated in the modified judgment. Defendants' attempts to characterize those agreements as some form of new business because they contained new terms and the prior collateral agreements had "expired" or "terminated" does not take those collateral agreements outside the scope of paragraph 5; given the parties' intent that plaintiff continue to reap the benefits of the business, we must interpret those contracts as being within paragraph 5 because they involved the same wire transfer business, the same parties, and the same basis of payment to Progeny.

Although the trial court took extrinsic evidence on the parties' understanding of the new collateral agreements and the modified judgment, this evidence was properly part of the trial court's resolution of the declaratory relief claim. However, in ruling on the declaratory relief claim, the court necessarily resolved Yeboah's breach of contract claim because the declaratory relief claim and the breach of contract claim were deeply intertwined. (See *Unilogic, Inc. v. Burroughs Corp.*, *supra*, 10 Cal.App.4th at p. 8.) Once the collateral agreements were found pursuant to the equitable trial on the

declaratory relief claim to be within the scope of the modified judgment, the court at the same time implicitly and contemporaneously determined that defendants breached the modified judgment because they refused to share the rewards of the new collateral agreements with plaintiff, and conceded that plaintiff was not being paid. This refusal flowed from the defendants' position that the new collateral agreements were not encompassed by the modified judgment, the very issue decided as part of the declaratory relief claim. As a result, the gist of the action in this case was the declaratory relief claim because it was central to both causes of action, and a jury trial was not mandated.

Since we determine that the trial court did not erroneously deny defendants a jury trial, we need not consider whether they waived such claim.

DISPOSITION

The judgment is affirmed. Respondent is to recover costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.