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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

TED MARCHIBRODA, JR., Plaintiff and Appellant, v. MARVIN DEMOFF et al., Defendants and Respondents.	B246689 (Los Angeles County Super. Ct. No. BC463829)

APPEAL from a judgment of the Superior Court of Los Angeles, Terry A. Green, Judge. Affirmed.

Sullivan, Workman & Dee, Charles D. Cummings, D. Daniel Pranata and Karyn A. McCreary for Plaintiff and Appellant.

Freedman + Taitelman, Bryan J. Freedman and Bradley H. Kreshek for Defendants and Respondents.

In the underlying action, the trial court granted summary judgment against appellant Ted Marchibroda, Jr. (Marchibroda), in his action against respondents Marvin Demoff and Demoff Sports Group, Inc. We affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

There are no material disputes regarding the following facts: In 2005, Marchibroda and Demoff were contract advisors certified by the National Football League Players' Association (NFLPA). In December 2005 and January 2006, Marchibroda and Demoff jointly met with Chad Greenway, who was then ranked as a top college football player and a potential pick in the first round of the upcoming NFL draft. On January 16, 2006, Greenway entered into a NFLPA standard representation agreement with Demoff. After the Minnesota Vikings selected Greenway in the 2006 NFL draft, Demoff negotiated a five-year contract for him with that team. Later, Marchibroda met with Demoff regarding Greenway, and proposed that he be paid a fee equal to one-half of Demoff's compensation from Greenway. Demoff rejected Marchibroda's proposal, but paid him a portion of the compensation he received with respect to Greenway's first five seasons in the NFL.

In 2009, Alex Mack, a college football player, was a potential pick in the first round of the upcoming NFL draft. In January 2009, Marchibroda learned that Mack was seeking an agent to negotiate his contract, and contacted Demoff regarding Mack. Mack later entered into a representation agreement with Demoff, who negotiated a contract for Mack with the Cleveland Browns.

In June 2011, Marchibroda initiated the underlying action against respondents, alleging that Demoff breached contracts with Marchibroda relating to his efforts in persuading Greenway and Mack to enter into representation

agreements with Demoff. The complaint asserted claims for breach of contract, anticipatory repudiation, and declaratory relief in connection with Greenway, and claims for breach of contract and declaratory relief in connection with Mack.

Regarding Greenway, the complaint alleged that in consideration for Marchibroda's services, Demoff agreed to pay Marchibroda one-third of the fees he received from Greenway throughout his NFL career. However, in 2011, Demoff failed to pay Marchibroda all the compensation owed him arising from Greenway's initial NFL contract; in addition, with respect to Greenway's future NFL contracts, Demoff told Marchibroda that he would pay only $20,000 per year, which was less than one-third of the fees he would receive from Greenway.

Regarding Mack, the complaint alleged that in 2009, Demoff agreed to pay Marchibroda the reasonable value of his services for persuading Mack to enter into the representation agreement. According to the complaint, the reasonable value of those services was one-third of all the fees Demoff would receive from Mack throughout his NFL career. Thereafter, in late 2010 or 2011, Demoff received some fees from Mack, but refused to give Marchibroda any portion of those fees.

In June 2012, respondents sought summary judgment or adjudication on the complaint. They contended, inter alia, that the purported contract between Marchibroda and Demoff related to Greenway was unenforceable due to a lack of consideration, arguing that Marchibroda performed his services before Demoff offered to make any payments to him. They further contended that contrary to the allegations in the complaint, there was no express contract between Marchibroda and Demoff related to Mack. In granting summary judgment, the trial court concluded that the purported Greenway-related contract failed for want of consideration, and that there were no triable issues of fact regarding the existence

of the alleged Mack-related contract. On December 14, 2012, judgment was entered in favor of respondents and against Marchibroda.

DISCUSSION

Marchibroda contends the trial court erred in granting summary judgment. For the reasons explained below, we disagree.

A. *Standard of Review*

"A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party 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." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In moving for summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X." (*Id*. at p. 853.)

"'Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662 (*Bostrom*).) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that

negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid*.)

Although we independently assess a grant of summary judgment (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819), our review is subject to two constraints. Under the summary judgment statute, we examine the evidence submitted in connection with a summary judgment motion, with the exception of evidence to which objections have been appropriately sustained. (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 711; Code Civ. Proc., § 437c, subd. (c).) Moreover, our review is governed by a fundamental principle of appellate procedure, namely, that "'[a] judgment or order of the lower court is presumed correct,'" and thus, "'error must be affirmatively shown.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted, quoting 3 Witkin, Cal. Procedure (1954) Appeal, § 79, pp. 2238-2239.) Marchibroda thus bears the burden of establishing error on appeal, even though respondents had the burden of proving their right to summary judgment before the trial court. (*Frank and Freedus v. Allstate Ins. Co.* (1996) 45 Cal.App.4th 461, 474.) For this reason, our review is limited to contentions adequately raised in Marchibroda's briefs. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126 (*Christoff*).)

The two constraints narrow the scope of our inquiry. Here, respondents raised evidentiary objections to the showing proffered by Marchibroda, which the trial court sustained with respect to one item of evidence. Because Marchibroda does not challenge that ruling on appeal, he has forfeited any contention of error regarding it.

Marchibroda also has forfeited any contention that summary judgment was improper because the trial court denied him leave to amend his complaint. In this

regard, we note that the trial court, in granting summary judgment, concluded that respondents were not required to rebut the existence of implied-in-fact contracts between Marchibroda and Demoff because the complaint alleged no such contracts (see pt. C., *post*). Although plaintiffs opposing summary judgment may seek leave to amend their complaint (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1265), Marchibroda never asked the trial court for an opportunity to amend his complaint, and does not do so on appeal. We therefore limit our inquiry to the propriety of summary judgment on the claims alleged in his complaint. (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 499; *Christoff, supra,* 134 Cal.App.4th at pp.125-126.)

B. *Principles Regarding the Pleading of Contracts*

The key issues before us concern whether Demoff breached any contract with Marchibroda, to the extent the complaint alleges the existence of contracts between them. Generally, contracts may be express or implied-in-fact.[1] (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 246 (*Youngman*).) The primary difference between these types of contracts lies in the manner by which their existence is proved. (*Id.* at p. 246.) As our Supreme Court has explained, "the terms of an express contract are stated in words, while those of an implied agreement are manifested by conduct." (*Ibid*.)

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[1] Our discussion here is limited to implied-in-fact contracts, which must be distinguished from so-called "contracts implied in law" or quasi-contracts. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 102-103, pp. 144-147.) "'Quasi-contracts have often been called implied contracts or contracts implied in law; but, unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice.'" (*Id*. at p. 146, quoting Rest.2d, Contracts §4, com. b.)

These principles are applicable to express and implied contracts of employment. Ordinarily, the former are established by explicit words of agreement, whereas the latter arise from a course of conduct -- which may include verbal representations -- that creates an agreement. (*Foley v. Interactive Data Corporation* (1988) 47 Cal.3d 654, 675, 677 (*Foley*).) Thus, "where one party performs for another, with expectation of payment, a special service of a character which is ordinarily charged for and the latter knowingly accepts it in circumstances negating an inference of [a] gift, a contract to pay reasonable value thereof will be implied." (*Keene v. Keene* (1962) 57 Cal.2d 657, 664.)

Express and implied contracts have as their "essential elements" mutual assent and consideration. (*Chandler v. Roach* (1957) 156 Cal.App.2d 435, 440.) "Consideration is a benefit conferred or agreed to be conferred upon the promisor or prejudice suffered or agreed to be suffered 'as an inducement' to the promisor." (*Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1102, quoting Civ. Code, § 1605.) Thus, consideration may exist when a party renders services, or offers to render them. (*Parke etc. Co. v. San Francisco Bridge Co.* (1904) 145 Cal. 534, 538.) In addition, consideration may exist when a party offers to compromise or settle a good faith dispute arising out of a prior contract. (*Enslow v. Von Guenthner* (1961) 193 Cal.App.2d 318, 321-322.)

The provision of services acquires the status of consideration only under limited circumstances. Generally, for purposes of a contract, "the consideration for a promise must be an act or a return promise, bargained for and given in exchange for the promise." (*Simmons v. California Institute of Technology* (1949) 34 Cal.2d 264, 272.) The provision of services or benefits constitute consideration only when they "result from a bargain" (*Passante v. McWilliam* (1997) 53 Cal.App.4th 1240, 1247), regardless of whether the recipient of the services is subject to a

purely moral obligation to pay for them (*Dow v. River Farms Co.* (1952) 110 Cal.App.2d 403, 408-409).

In reviewing the grant of summary judgment, our focus is initially on the extent to which the complaint alleges the existence of valid contracts between Marchibroda and Demoff. This is because "'"it is [the complaint's] allegations to which the motion must respond by establishing . . . there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading. [Citation.]"'" (*Bostrom, supra*, 35 Cal.App.4th at p. 1662.) As it is undisputed that Marchibroda and Demoff entered into no written contract, we examine the requirements for pleading oral and implied-in-fact contracts.

Generally, "[a]n oral agreement may be pleaded generally as to its effect, as it is rarely possible to allege the exact words." (*Scolinos v. Kolts* (1995) 37 Cal.App.4th 635, 640.) Nonetheless, in an action on an oral contract, consideration normally must be pleaded. (*Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 284; *Levy v. Bellmar Enterprises* (1966) 241 Cal.App.2d 686, 690-691.) Because an implied-in-fact contract for services arises from a course of conduct, rather than from explicit words of agreement, "only the facts from which the promise [to pay] is implied must be alleged." (*Youngman, supra*, 70 Cal.2d at p. 247.)

C. *Marchibroda's Claims*

We turn to the allegations in the complaint, which frame the issues pertinent to a motion for summary judgment. Regarding the purported contract between Marchibroda and Demoff related to Greenway, the complaint alleged: "In 2005 and 2006, [Marchibroda] met with . . . Greenway . . . to discuss [Marchibroda] and Demoff . . . representing . . . Greenway in contract negotiations with an [NFL]

team. [¶] . . . In 2006[,] after . . . Greenway had completed his college football career at the University of Iowa, [Marchibroda's] efforts were a substantial factor in persuading . . . Greenway to sign a contract pursuant to which Demoff became . . . Greenway's agent or contract advisor in negotiating NFL contracts . . . . [¶] . . . In consideration for such services[,] Demoff agreed to pay [Marchibroda] one-third of all of the fees that Demoff received for Demoff's services in representing . . . Greenway . . . throughout . . . Greenway's NFL career . . . ."

The complaint further alleged that Marchibroda performed his obligations under his contract with Demoff, who failed to pay all the compensation due to Marchibroda. According to the complaint, Demoff appropriately compensated Marchibroda with respect to the first three years of Greenway's initial NFL contract. However, in 2011, when Demoff received his fees for the final two years of that contract, he paid Marchibroda only a portion of the compensation owed to him; moreover, Demoff declined to pay any compensation related to Greenway's future NFL contracts.

Regarding the purported contract between Marchibroda and Demoff related to Mack, the complaint alleged: "In 2009, Demoff agreed to pay [Marchibroda] . . . the reasonable value of his services for persuading . . . Mack . . . to sign a contract pursuant to which Demoff became . . . Mack's agent or contract advisor in negotiating NFL contracts between . . . Mack and an NFL team. [Marchibroda] is informed and believes that the reasonable value of such services is one-third of all of the fees that Demoff receives for Demoff's services in representing . . . Mack . . . throughout . . . Mack's NFL career. [¶] . . . In 2009[,] after . . . Mack had completed his college football career at the University of California[, Marchibroda's] efforts were a substantial factor in persuading . . . Mack to sign a contract pursuant to which Demoff became . . . Mack's agent or contract advisor in

negotiating NFL contracts . . . ." The complaint further alleged that Marchibroda performed his obligations under his contract with Demoff, who refused to pay the compensation due Marchibroda.

D. *Respondents' Showing*

In seeking summary judgment, respondents contended that the purported agreement between Marchibroda and Demoff relating to Greenway, as alleged in the complaint, failed for want of consideration, and that there was no agreement between Marchibroda and Demoff relating to Mack. In addition, respondents contended that even if the latter contract existed, Demoff owed Marchibroda no compensation, because Mack became Demoff's client for reasons independent of Marchibroda's efforts.

1. *Greenway*

Regarding the purported agreement relating to Greenway, respondents observed that Marchibroda relied exclusively on the theory that the pertinent contract was oral. They pointed to Marchibroda's response to an interrogatory requiring him to describe "each agreement alleged in the pleadings" that was "not in writing." Marchibroda stated: "Commencing in approximately the Spring and Summer of 2006, [Marchibroda] and . . . Demoff *orally* agreed that [he] would assist [respondents] in persuading potential NFL players to retain . . . Demoff as the contract advisor . . . . In consideration for this, [respondents] agreed to pay

[Marchibroda] one-third of all future payments by such NFL players who retained the services of [respondents] . . . ."[2] (Italics added.)

With respect to that purported oral agreement, respondents submitted evidence supporting the following version of the underlying facts: Prior to June 2005, Marchibroda and Demoff never worked together regarding the representation of any player or potential player in the NFL. In July 2005, after meeting Greenway, Marchibroda decided to refer him to a more established agent, such as Demoff. When Marchibroda phoned Demoff regarding Greenway, Demoff expressed an interest in representing Greenway and asked Marchibroda to "keep in touch." According to Demoff, during the conversation, Marchibroda mentioned no fee sharing arrangement, and Demoff had no expectation that Marchibroda would request compensation. In a declaration, Demoff stated: "I did not have any expectation that Marchibroda would request, or require, compensation, or that any compensation would be paid. Had I had such expectation, I would have negotiated the amount of the compensation prior to taking any further action."

After the 2005 college football season ended, Marchibroda arranged for Demoff to meet with Greenway. In December 2005 and January 2006, Marchibroda and Demoff twice visited Greenway. Marchibroda never suggested that he sought compensation prior to the visits. On January 17, 2006, Demoff entered into a representation agreement with Greenway. When he phoned Marchibroda to announce the agreement, Marchibroda did not raise the issue of

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[2] Although respondents did not cite Marchibroda's interrogatory response in moving for summary judgment, they submitted it with their reply, and the trial court relied on it in granting summary judgment. As Marchibroda has raised no contention of error regarding the response, he has forfeited any such contention. (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1133, fn. 8.)

compensation. Marchibroda had no further involvement in Demoff's representation of Greenway.

After the Minnesota Vikings selected Greenway in the first round of the 2006 NFL draft, Demoff negotiated a five-year contract for Greenway with that team. Later, Demoff met with Marchibroda, who suggested that he should be paid a fee equal to 50 percent of the compensation Demoff received from Greenway while Demoff represented him. Demoff rejected the suggestion, but gratuitously offerred to pay Marchibroda one-third of the fees he received with respect to Greenway's initial NFL contract. According to Demoff, he "did not feel [that he] had any legal obligation to pay Marchibroda anything for the Greenway 'referral,'" but made the offer "because [he] believed it to be in [his] best interest and the morally right thing to do." Marchibroda accepted the offer.

Later, Demoff paid Marchibroda one-third of the fees he received from Greenway with respect to the first four years of Greenway's initial NFL contract. Regarding the final year of that contract, Demoff paid $20,000 to Marchibroda, which represented one-third of the fees Demoff received from Greenway, less a sum Demoff believed Marchibroda owed him for services related to a different NFL player, Slade Norris.

2. *Mack*

With respect to the purported agreement between Marchibroda and Demoff relating to Mack, respondents submitted evidence supporting the following version of the underlying facts: In January 2009, Marchibroda attended the Senior Bowl to recruit players as potential clients. According to Demoff, Marchibroda did not do so at his request. While at the Senior Bowl, Marchibroda learned that Mack did not have an agent for purposes of negotiating his NFL contracts, and that Mack

was working with another agent, Timothy M. Younger, to find such an agent. Marchibroda then contacted Demoff to determine whether he was interested in representing Mack. During their conversation, Marchibroda never suggested that he expected a fee for bringing Mack to Demoff's attention, and Demoff did not believe that he sought any compensation. Respondents denied the existence of any agreement between Marchibroda and Demoff relating to Mack.

Later, in February 2009, Younger contacted the NFLPA to identify candidate agents for Mack. At the NFLPA's recommendation, Younger inquired whether Demoff would act as Mack's agent. After Demoff agreed, he negotiated Mack's initial NFL contract. According to respondents, Marchibroda played no role in Younger's selection of Demoff or in Demoff's representation of Mack.

E. *Marchibroda's Opposition*

In opposing summary judgment, Marchibroda contended that the agreement regarding Greenway alleged in the complaint was supported by adequate consideration, namely, a prior implied-in-fact agreement between Marchibroda and Demoff. In addition, Marchibroda maintained that there was an enforceable implied-in-fact agreement between Marchibroda and Demoff regarding Mack.

1. *Greenway*

Marchibroda acknowledged that his Greenway-related claims were predicated on an express oral agreement, the terms of which were specified in the complaint. He nonetheless argued that in late 2005 and early 2006, an implied-in-fact agreement was established that obliged Demoff to pay Marchibroda the reasonable value of his services in recruiting Greenway. According to Marchibroda, the implied agreement constituted consideration for the oral

agreement alleged in the complaint. As stated in his opposition, "Marchibroda is *not* suing on the implied contract . . . . However, that implied contract and all of the services of . . . Marchibroda performed in furtherance of it are the consideration for the express promise by Demoff to pay . . . Marchibroda one-third of the fees that he would receive from representing . . . Greenway." (Italics added.) Marchibroda maintained that the express oral contract resolved a dispute regarding the reasonable value of the fees owed Marchibroda under the implied contract.

Marchibroda's showing did not challenge certain aspects of respondents' account of the underlying events. He conceded as undisputed that he had no player-related dealings with Demoff before June 2005, and that he did not raise the issue of compensation when Demoff announced his contract with Greenway in January 2006. In addition, notwithstanding the complaint's allegations that Demoff failed to compensate him fully with respect to Greenway's initial NFL contract, Marchibroda did not dispute that Demoff paid him one-third of the fees arising from Greenway's initial NFL contract, less a sum that Marchibroda owed Demoff in connection with an unrelated matter.

In an effort to raise triable issues regarding the existence of an implied-in-fact agreement, Marchibroda submitted evidence that when he and Demoff visited Greenway, they discussed the appropriate fee for their services to Greenway. Furthermore, immediately after he and Demoff completed their second visit with Greenway, he told Demoff that he wanted 50 percent of Greenway's fee. According to Marchibroda, Demoff did not reply to that proposal. Later, when Demoff phoned Marchibroda to announce his contract with Greenway, Demoff said, "Congratulations, we got a new client."

In addition, Marchibroda maintained that in late 2005 and 2006, the customs and practices of NFLPA agents placed Demoff on notice that Marchibroda

expected compensation for his services. Marchibroda's declaration stated: "Based on my more than twenty years experience as an NFLPA contract advisor/agent, I know that it is common for two or more NFLPA contract advisors/agents[] to work together to sign a college football player and to split the fees. This occurs more frequently when the college player that is being recruited is a potential high NFL draft." Marchibroda also pointed to an NFLPA newsletter that stated: "The [NFLPA] regulations also require agents and players to complete two disclosure forms when applicable. The SRA disclosure [f]orm . . . informs players how much a recruiter or 'runner' is being paid by an agent for assistance in signing that player as a client. Thirty agents sent in forms listing a total of 39 runners. Fees to the recruiter typically range from 33 to 50 percent of the agent's commission."

Marchibroda also submitted evidence that the express oral agreement alleged in the complaint resolved a dispute regarding the compensation owed him under the implied agreement. According to his showing, in early 2006, after Greenway executed the representation contract with Demoff, Marchibroda proposed that he and Demoff receive equal shares of the fees that Greenway paid Demoff. Demoff replied, "[N]o," but asked Marchibroda to "exchange written numbers." When Marchibroda refused to do so, Demoff suggested that they give the matter some thought and discuss it again. During a later discussion, Marchibroda again asked for an equal share of the fees. In response, Demoff offered him two alternatives, namely, one-third of the fees from all of Greenway's NFL contracts, or 30 percent of the fees from Greenway's initial NFL contract, coupled with 35 percent of the fees from his future contracts. Marchibroda accepted the first alternative.

2. *Mack*

Marchibroda did not challenge respondents' contention that there was no express agreement between Marchibroda and Demoff regarding Mack, but maintained that they entered into an implied-in-fact agreement. To show such a contract, Marchibroda relied on his evidence regarding the customs and practices of the NFLPA and his dealings with Demoff in connection with Greenway. In addition, he offered evidence of his services regarding Mack.

According to Marchibroda, he attended the 2009 Senior Bowl on behalf of himself and Demoff, in an effort to recruit Rey Maualuga, who played college football at the University of Southern California. When Marchibroda learned that Mack was looking for an agent, he contacted Demoff, who asked him to begin recruiting Mack. Marchibroda phoned Younger, learned that Mack wished potential agents to complete a questionnaire, and obtained a copy of the questionnaire, which he forwarded to Demoff. Later, when Marchibroda discovered that Demoff had not completed and returned the questionnaire, Marchibroda contacted Demoff and urged him to do so. Demoff sent the completed questionnaire to Mack, who entered into a representation agreement with Demoff.

F. *Trial Court's Ruling*

In granting summary judgment, the trial court stated that the complaint did not plead the theories that Marchibroda relied on in opposing respondents' motion. Regarding the purported oral agreement relating to Greenway, the court noted that the only consideration alleged for the express oral agreement was Marchibroda's services, which were fully rendered before Demoff agreed to pay Marchibroda. The court concluded that "Demoff's fee splitting offer . . . under the facts alleged,

was a gift, because there was no bargained-for exchange." The court further determined that Marchibroda could not properly rely on the theory that a prior implied agreement supplied the consideration for the oral contract, as the complaint alleged no such implied contract. The court stated that Marchibroda's opposition, in offering the theory, "impermissibly seeks to expand the scope of his pleading."

The court also identified another defect in Marchibroda's claims, insofar as they relied on the existence of a prior implied agreement. As the court noted, Marchibroda's evidence regarding the customs and practices of NFLPA agents showed that recruiters working with agents received a fee for their services based solely on a player's initial NFL contract. Because Marchibroda received over $100,000 attributable to Greenway's initial NFL contract and did not dispute that this constituted one-third of Demoff's fees from that contract (with proper adjustments), the court concluded that Marchibroda had been "compensated in full for any implied contract or for any claim he could have brought based on quantum meruit."

Regarding the purported contract between Marchibroda and Demoff relating to Mack, the court stated: "[Marchibroda] now concedes that there was no express agreement . . . , but [contends] that such an agreement was implied. Again, this implied agreement is not alleged anywhere in [the] complaint. [Marchibroda's] opposition, then, impermissibly seeks to expand the scope of the pleading."[3]

G. *Analysis*

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[3] In addition, the trial court determined that Mack did not sign a representation agreement with Demoff as the result of Marchibroda's recruiting efforts.

We agree that summary judgment was proper on Marchibroda's claims, as his complaint failed to allege facts supporting the implied contracts upon which he now relies.

1. *Governing Principles*

Because "[t]he procedure for summary judgment presupposes that the pleadings are adequate to put in issue a cause of action" (*FPI Dev., Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 382), the pleadings ordinarily "set the boundaries of the issues to be resolved at summary judgment" (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648). This principle imposes restrictions on the extent to which a plaintiff opposing summary judgment may offer theories not alleged in the complaint or cure defects in the pleading of a claim.

Generally, a plaintiff opposing summary judgment "cannot bring up new, unpleaded issues in his or her opposing papers." (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98.) "'To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings . . . . [Citations.]' [Citation.] '. . . [Plaintiff's] separate statement of material facts is not a substitute for an amendment of the complaint. [Citation.]' [Citation.]" (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253 (*Laabs*).)

As noted above (see pt. A., *ante*), Marchibroda has never sought leave to amend before the trial court or on appeal. Because he has elected to stand on his complaint, we assess the propriety of summary judgment in light of its allegations.

2. *Claims Related to Greenway*

We begin with Marchibroda's Greenway-related claims. As alleged in the complaint, those claims hinge on a specific theory of consideration, namely, that Marchibroda's services in persuading Greenway to sign a representation contract with Demoff were the consideration for Demoff's agreement to pay Marchibroda one-third of the fees that Demoff received from Greenway throughout his NFL career.

Generally, "there are two requirements in order to find consideration. The promisee must confer (or agree to confer) a benefit or must suffer (or agree to suffer) prejudice. . . . [¶] It is not enough, however, to confer a benefit or suffer prejudice for there to be consideration. . . . [T]he second requirement is that the benefit or prejudice '"must actually be bargained for as the exchange for the promise."' Put another way, the benefit or prejudice must have induced the promisor's promise." (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 420-421, quoting *Bard v. Kent* (1942) 19 Cal.2d 449, 452.)

Here, respondents maintained that Marchibroda's services did not satisfy the the second requirement for consideration. They offered evidence that Demoff did not expect Marchibroda to demand compensation for his services, which were fully performed well before Marchibroda requested payment and Demoff allegedly made the express promise identified in the complaint.

In our view, respondents's showing shifted the burden on summary judgment to Marchibroda to raise triable issues regarding the theory of consideration alleged in the complaint. This he failed to do. In opposing summary judgment, Marchibroda effectively conceded that his services were not "'"bargained for as the exchange for"'" the express agreement alleged in the

complaint (*Steiner v. Thexton*, *supra*, 48 Cal.4th at p. 420, quoting *Bard v. Kent*, *supra*, 19 Cal.2d at p. 452). Marchibroda relied exclusively on a theory of consideration predicated on the existence of a prior implied-in-fact agreement. Before the trial court and on appeal, Marchibroda has maintained that his services were rendered pursuant an implied agreement based on Demoff's conduct, which obliged Demoff to pay Marchibroda the reasonable value of his services. According to Marchibroda, after he provided his services under the implied agreement, a dispute arose as to the amount Demoff owed Machibroda, which they resolved by entering into the express agreement upon which Marchibroda's claims rely.

We agree with the trial court that Marchibroda's "implied agreement" theory of consideration is not alleged in the complaint. As noted above (see pt. B., *ante*), a complaint asserting a breach of an express oral contract claim must allege the consideration for the oral contract. Furthermore, to plead an implied-in-fact contract, a complaint should allege "the facts from which the promise is implied . . . . " (*Youngman*, *supra*, 70 Cal.2d at p. 247.) In the case of implied-in-fact employment agreements, it ordinarily suffices to allege a course of conduct or other circumstances creating a reasonable expectation that the pertinent promise was made. (See *Foley*, *supra*, 47 Cal.3d at pp. 675-682.)

Here, the complaint contains no allegations supporting an implied promise on Demoff's part to compensate Marchibroda. Regarding the circumstances preceding the express oral agreement, the complaint alleges only that Demoff and Marchibroda were NFLPA contract advisors, that Marchibroda met with Greenway, and that Marchibroda's efforts were a substantial factor in persuading Greenway to hire Demoff. Notably absent are any allegations regarding a course of conduct involving Demoff and Marchibroda prior to the express agreement that

would support the existence of an implied-in-fact agreement. Accordingly, because Marchibroda failed to plead facts demonstrating an "implied agreement" theory of consideration, respondents were not obliged to show the absence of triable issues regarding it. (See *Nein v. HostPro, Inc.* (2009) 174 Cal.App.4th 833, 851, 852 (*Nein*) [when complaint alleged only breach of a written employment contract, plaintiff failed to defeat summary judgment by raising triable issues regarding the existence of an oral employment contract]; *Laabs*, *supra*, 163 Cal.App.4th at pp. 1252-1258 [plaintiff failed to defeat summary judgment by providing evidence supporting new theory of liability not alleged in complaint; discussing cases].)

For the first time on appeal, Marchibroda suggests that his complaint was sufficient to allege an implied-in-law agreement -- rather than an implied-in-fact agreement -- for purposes of establishing the consideration for the express agreement. His reliance on *Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778 is misplaced. *Weitzenkorn* stands for the proposition that the assertion of a "common count" in a complaint is sufficient to state a cause of action upon an implied-in-fact contract or an implied-in-law contract, that is, a "quasi contract." (*Id*. at pp. 793-794, 795.) Under a quasi-contract, a plaintiff who provides services may recover the reasonable value of those services on a theory of quantum meruit. (*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 906.)

Generally, "[q]uantum meruit refers to the well-established principle that 'the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.' [Citation.] To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was

to be made' [citations]." (*Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 458.)

To allege recovery in quantum meruit, the complaint need not expressly contain a claim identified as a common count. (See *Donegan v. Houston* (1907) 5 Cal.App. 626, 630-631.) Nonetheless, although the rules for pleading recovery in quantum meruit are liberal, the complaint must state "directly or impliedly the relationship or the express or implied legal principle upon which [the defendant's promise] to [the] plaintiff is predicated." (*Vaughn v. Certified Life Ins. Co.* (1965) 238 Cal.App.2d 177, 180-181.) Thus, to plead recovery in quantum meruit, the complaint must ordinarily allege that the services were provided at the defendant's request, or that they were rendered to the defendant personally, thus raising the inference that the defendant impliedly requested them or impliedly promised to pay for them while they were being delivered. (*Smith v. Bentson* (1932) 127 Cal.App.Supp. 789, 793-794.)

As no such facts are alleged in Marchibroda's complaint, it does not state the existence of a quasi-contract, for purposes of establishing the consideration for the purported express oral agreement. (*Smith v. Bentson*, *supra*, 127 Cal.App.Supp. at pp. 793-794.) For this reason, respondents were not required to address the existence of a quasi-contract in seeking summary judgment. In sum, summary judgment was properly granted with respect to Marchibroda's claims predicated on the purported express oral agreement relating to Greenway.[4]

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[4] Under any of the theories advanced by Marchibroda, these claims are also subject to another defect. Generally, "past consideration will not support a promise which is in excess of the promisor's existing debt or duty . . . ." (*Leonard v. Gallagher* (1965) 235 Cal.App.2d 362, 373.) Thus, a contract intended to resolve a dispute regarding an obligor's outstanding debt cannot impose an obligation on the obligor greater than the debt. (*Ibid*., fn. 3.) As the trial court noted, even if Marchibroda had properly pleaded an
(Fn. continued on next page.)

3. *Claims Related to Mack*

We reach the same conclusion regarding Marchibroda's claims predicated on the purported agreement relating to Mack. Regarding that agreement, the complaint alleged that "[i]n 2009," Demoff agreed to pay Marchibroda the reasonable value of his services for recruiting Mack, and that Marchibroda's efforts were "a substantial factor" in persuading Mack to hire Demoff. In seeking summary judgment, respondents submitted evidence that in 2009, Demoff made no oral promise to pay Marchibroda for his services. This showing was sufficient to shift the burden to Marchibroda to raise triable issues regarding the existence of an oral contract, but he did not attempt to do so. Instead, he effectively conceded that there was no express agreement, and argued only that there were triable issues regarding the existence of an implied-in-fact agreement.

We agree with the trial court that the complaint alleges no implied-in-fact agreement. For the reasons discussed above (see pt. B., *ante*), to state such an agreement, a complaint must contain more than a bare allegation of an agreement. (See *Hentzel v. Singer Co.* (1932) 138 Cal.App.3d 290, 304 [bare allegation that there was an implied employment agreement was insufficient to plead the existence of such an agreement].) Generally, to allege the existence and terms of an implied employment agreement, the complaint must plead facts sufficient to show an implied promise regarding employment, which may include "'the personnel

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implied contract for the reasonable value of his services as a recruiter, his evidence, at best, showed that a recruiter's fee is based solely on the player's initial NFL contract. Thus, under the purported express oral agreement, Marchibroda could recover no more than the difference (if any) between the reasonable value of his services related to Greenway's initial NFL contract and the compensation that Demoff actually paid him, which exceeded $100,000.

policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.'" (*Foley*, *supra*, 47 Cal.3d at p. 680.)

Here, the complaint alleges no circumstances establishing Demoff's implied promise to compensate Marchibroda for his efforts related to Mack. The only other facts alleged in the complaint are that in 2006, Demoff agreed to compensate Marchibroda in consideration for his services related to Greenway. Absent are allegations regarding a continuing employment relationship, assurances from Demoff that he would pay compensation whenever Marchibroda made efforts to recruit other players, or descriptions of the practices of NLFPA agents suggesting an implied promise of payment. The complaint thus failed to allege an implied-in-fact agreement, and respondents were not obliged to address that theory in seeking summary judgment. (See *Nein*, *supra*, 174 Cal.App.4th at pp. 851-852.)

On appeal, Marchibroda contends the trial court erred in concluding that his complaint did not adequately plead recovery in quantum meruit.[5] We disagree. As explained above (see pt. G.2, *ante*), to allege a quasi-contract related to the provision of services, a complaint must state facts showing that the services were rendered under circumstances demonstrating a request for them or an implied promise of payment. No such facts are alleged in the complaint. In sum, summary judgment was properly granted with respect to Marchibroda's claims predicated on the purported agreement relating to Mack.

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[5] Although Marchibroda's opposition did not suggest that his complaint alleged a quasi-contract related to Mack, the trial court addressed and rejected that theory as well in granting summary judgment.

DISPOSITION

Judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.