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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JAYENDRA A. SHAH,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES,

Defendant and Respondent.

B260591

(Los Angeles County  
Super. Ct. No. BC491572)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed.

Frank A. Weiser for Plaintiff and Appellant.

Peterson • Bradford • Burkwitz, Avi Burkwitz and Gil Burkwitz, for Defendant and Respondent County of Los Angeles.

Doctor Jayendra Shah (plaintiff), a former employee of defendant Los Angeles County (the County), sued the County for employment discrimination. The parties negotiated a settlement agreement that included a condition requiring the County Board of Supervisors (the Board) to approve the agreement before it would become effective. If effective, the agreement provided plaintiff would receive a specified payment if he resigned his position with the County by a specified date. Plaintiff resigned on that date, even though he knew the Board had not yet considered whether to approve the agreement. When the agreement came before the Board for consideration, the Board rejected it. Plaintiff then sued to enforce the agreement, and the trial court granted summary judgment for the County. We are asked to decide whether plaintiff could prevail at trial on a breach of contract theory such that the grant of summary judgment should be reversed.

## I. BACKGROUND

### A. *Representatives for the Parties Negotiate an Agreement to Settle Ongoing Litigation, but the Board Does Not Approve It*

In November 2006, plaintiff filed an action against the County in federal court, asserting claims for discrimination based on contentions the County failed to assign him appropriate work (the Action). The County prevailed in the Action on summary judgment and the court awarded the County \$162,383 in attorney fees.

While plaintiff's appeal of the judgment in the Action was pending, plaintiff and the Office of County Counsel negotiated and signed a document entitled "Settlement and Release Agreement" (the Agreement). Under the terms of the Agreement, the County would pay plaintiff \$100,000 within 14 days of the Board's approval of the Agreement, and the County would further waive its right to recover the attorney fees award made by the district court. In exchange, plaintiff would be obligated to dismiss his pending appeal in the Action (and any other complaints or actions filed against the County) and "resign and retire from employment with the County" effective March 30, 2009, or the date on which he received the settlement payment, whichever came first. Most pertinent to the

question we decide, the Agreement included provisions stating it would be final and effective only once the County had completed the appropriate approval process: “This settlement agreement and release is contingent upon approval by the County through the appropriate approval process (“County approval”) and will become effective only upon County approval; ¶¶ “Subject to the County approval, this settlement agreement and release contains the final and enforceable material terms for the settlement between the Parties which will be incorporated into an appropriate long form settlement agreement formalized by counsel and executed by the Parties.” Plaintiff, his attorney, and an attorney for the County signed the Agreement on January 27, 2009.

Sometime before the date on which the Agreement called for plaintiff to resign, March 30, 2009, plaintiff’s attorney discussed the approaching resignation date with an attorney for the County. The County’s lawyer told plaintiff’s counsel that the Agreement could not be scheduled for consideration by the Board until after March 30, 2009. Plaintiff, however, retired from his position with the County on that date. When the Board met later in June 2009 to consider the Agreement, the Board rejected it. Plaintiff thereafter demanded to be reinstated to his position, but the County refused.

*B. Plaintiff Sues to Enforce the Agreement and the Court Grants Summary Judgment for the County*

Just over three years after the Board rejected the Agreement, in September 2012, plaintiff sued the County seeking damages, declaratory relief, and an injunction.<sup>1</sup> The

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<sup>1</sup> In the meantime, plaintiff proceeded with his appeal of the Action, and the United States Court of Appeals for the Ninth Circuit affirmed the district court judgment. Plaintiff also filed a second federal action in October 2008 (2008 Action) and asserted civil rights claims arising out of the alleged breach of the settlement agreement. Plaintiff’s operative third amended complaint in the 2008 Action was dismissed in August 2010, and the court awarded attorneys’ fees to the County. In March 2012, the Ninth Circuit affirmed the judgment in the 2008 Action.

In light of the delay between the Board’s rejection of the Agreement and plaintiff’s filing of the complaint in this case, the County’s brief on appeal suggests plaintiff’s claims in this case are time barred. The county did not argue a statute of

sole cause of action presented in the unverified complaint against the County was for breach of contract.

Plaintiff alleged that the Agreement (a copy of which was attached as an exhibit to the complaint) included a promise by the County to hold a Board hearing to consider the Agreement before the date on which it called for him to retire. Plaintiff further alleged that, before he retired, “the County represented to plaintiff that approval of the agreement by the [Board] was a mere formality and that the hearing before the [Board] on the approval of the agreement could not be scheduled before the March 30, 2009 date, and relying on such a representation plaintiff retired in accordance with the agreement . . . .” The complaint also set forth plaintiff’s “understanding” that if he retired and the Board rejected the Agreement, he would be reinstated and receive full back pay.

The County moved for summary judgment. In addition to arguments asserting claim preclusion and noncompliance with the Government Tort Claims Act (Gov. Code, § 900 et seq. (GTCA)),<sup>2</sup> the County contended plaintiff could not succeed at trial on his breach of contract claim because the condition precedent on which the effectiveness of the Agreement depended—approval of the Agreement through the appropriate County process—had not been satisfied. In opposition, plaintiff submitted his own declaration and a declaration from his attorney, along with a memorandum of points and authorities. Two pages of the thirty page opposition were devoted to arguing he could establish a breach of contract. He asserted the “condition that plaintiff retire is . . . not effective” if the Board’s disapproval meant the agreement was not effective, and he also argued his reliance on the Agreement would “giv[e] rise to an alternative breach of contract theory for reinstatement under the doctrine of promissory or equitable estoppel.”

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limitations defense in moving for summary judgment, however, and we therefore do not reach that issue.

<sup>2</sup> These arguments are not material to our resolution of the appeal and we therefore do not summarize them further here or in the discussion that follows.

The trial court granted summary judgment for the County. The court found the Agreement never became effective because there was no dispute that the relevant contingency, approval of the Agreement by the Board, had not occurred. Thus, the court ruled, there was no contract that could have been breached. The court also rejected the alternative equitable theories of liability raised in plaintiff's summary judgment opposition, explaining: "Plaintiff argues he can establish an alternative theory under promissory estoppel or equitable estoppel. These theories are not pleaded in the complaint. They do not raise a triable issue of fact."

## II. DISCUSSION

The trial court rightly granted summary judgment for the County. Although plaintiff retired as specified in the Agreement, his retirement did not trigger the County's obligation to perform because the agreement was never effective; the Board did not approve the Agreement, and there is no dispute that Board approval was the condition necessary for the Agreement to be effective under its express terms. Because the Agreement never took effect, we likewise reject plaintiff's argument for reversal on the theory that an implied condition of the Agreement required his reinstatement if the Board of Supervisors rejected the Agreement. It is also well established that issues on summary judgment are framed by the pleadings, and we therefore hold plaintiff cannot defeat summary judgment on a promissory or equitable estoppel theory, neither of which were pled in his complaint.

### A. *Review on Summary Judgment*

To obtain summary judgment, a moving defendant must demonstrate that one or more elements of the plaintiff's cause of action cannot be established or that a complete defense to the plaintiff's cause of action exists. (Code Civ. Proc., § 437c, subd. (p)(2); see also *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 370.) We review a grant of summary judgment de novo, following the same three-step process as the trial court: "'we (1) identify the issues framed by the pleadings; (2) determine whether the

moving party has negated the opponent's claims; and (3) determine whether the opposition has demonstrated the existence of a triable, material factual issue. [Citation.] Like the trial court, we view the evidence in the light most favorable to the opposing party and accept all inferences reasonably drawn therefrom. [Citation.]' [Citation].” (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549.)

Summary judgment proceedings, including our review, are restricted to the issues raised in the pleadings. (*Hutton v. Fidelity Nat. Title Co.* (2013) 213 Cal.App.4th 486, 493 (*Hutton*); *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 182 [“We do not require [defendant] to negate elements of causes of action plaintiffs never pleaded”].) Thus, “the burden of a defendant moving for summary judgment only requires that he or she negate plaintiff’s theories of liability *as alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings.” (*Hutton, supra*, at p. 493 [papers filed in response to a defendant’s motion for summary judgment are not a substitute for an amendment to the pleadings]; accord, *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 [“It is the allegations in the complaint to which the summary judgment motion must respond”].)

*B. The Conditional Agreement Never Became Effective, and Plaintiff Cannot Rely on Estoppel Theories He Did Not Plead*

“The essential elements of a breach of contract claim are: ‘(1) the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting damages to plaintiff.’ [Citation].” (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614.) As a general matter, a settlement agreement is a contract and is therefore governed by the same legal principles applicable to contracts generally. (*Gorman v. Holte* (1985) 164 Cal.App.3d 984, 988.)

A condition is a fact, the happening or nonhappening of which either creates or extinguishes a duty on the part of the promisor. (*Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1009 [condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right

accrues or contractual duty arises]; see also *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 289 [“‘A condition *precedent* refers to an act, condition or event that must occur before the insurance contract becomes effective or binding on the parties . . . .’ (Croskey et al., Cal. Practice Guide, Insurance Litigation (The Rutter Group 2008) § 3:158, p. 3–47.)”]; 17A C.J.S. Contracts § 450 [“A condition precedent is a condition which must be performed before the agreement of the parties will become a binding contract or it also may be a condition which must be fulfilled before the duty to perform an existing contract arises”].) “The existence of a condition precedent normally depends upon the intent of the parties as determined from the words they have employed in the contract. [Citation.]” (*Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 199.)

Here, the existence of an effective contract (not merely the parties’ obligations to perform under an otherwise valid contract) was expressly conditioned on a contingency: the Board’s approval. The Board, of course, rejected the Agreement and there was therefore no contract that the County could have breached as plaintiff alleged.<sup>3</sup> (*Severance v. Knight-Counihan Co.* (1947) 29 Cal.2d 561, 563 [no contract existed where condition precedent unsatisfied]; see *San Francisco Internat. Yachting etc. Group v. City and County of San Francisco* (1992) 9 Cal.App.4th 672, 684 [no valid contract formed

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<sup>3</sup> Contrary to plaintiff’s allegation, the Agreement (a copy of which was attached to the complaint) contained no provision obligating the Board to hold the hearing on whether to approve the Agreement before plaintiff retired. To the extent plaintiff argues the Agreement contained an implied commitment to work in good faith to obtain the Board’s approval prior to his retirement, this argument necessarily fails because no implied covenant of good faith can exist in the absence of a valid, effective contract. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683-684, 689-690 [implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation]; *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1032 [no implied covenant of good faith absent an existing contract]; cf. *Jacobs v. Freeman* (1980) 104 Cal.App.3d 177, 189-190 [obligation to submit contract in good faith to corporation’s board of directors for approval is an implied term of contract except “where [as here] it can be said that reasonable persons would have understood that the agreement would not be effective when originally signed”].)

where draft lease and option agreements not approved by Board of Supervisors]; *Los Angeles Rams Football Club v. Cannon* (S.D. Cal. 1960) 185 F. Supp. 717, 721-722 [no valid contract formed when condition stating agreement would become valid and binding only if and when approved by NFL Commissioner unsatisfied].) That plaintiff opted to retire and thereby perform part of what would have been his obligations under the Agreement is immaterial. Plaintiff was under no obligation to do so, and the fact that he did does not mean there was a valid contract for the County to have breached.<sup>4</sup>

For the same reason, the County was not obligated to reinstate plaintiff to his prior position. His claim to a right of reinstatement rests on his belief the Agreement was a valid and effective contract, but as we have explained, the contract (the Agreement) never became effective. Moreover, even if the Agreement had been effective, it contains no provision providing for such reinstatement and all plaintiff mustered in support of his claim to the contrary when opposing summary judgment was his own declaration that related his “understanding”—from whom, if anyone, at the County we are not told—that he would be reinstated.<sup>5</sup> This would in any event be an insufficient factual showing to defeat summary judgment. (See *In re United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1018 [declaration largely without any evidentiary facts

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<sup>4</sup> We decline to address plaintiff’s meritless ratification-based contention that he did not raise in the trial court, i.e., the claim that the Agreement is effective notwithstanding the Board’s rejection because the County purportedly accepted the benefits of the Agreement (plaintiff’s resignation) after that rejection. *JRS Products, Inc. v. Matsushita Elec. Corp. of America* (2004) 115 Cal.App.4th 168, 178 [“Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider”].)

<sup>5</sup> Plaintiff’s declaration does state that his understanding was “also based” on the language in the Agreement that indicated it would become effective only upon Board approval and that, “as [he] understand[s] it,” the Board’s rejection of the agreement “nullified” his retirement. Plaintiff’s understanding is inconsistent with the terms of the Agreement, which even if effective, provide for no such nullification.



insufficient to establish a triable issue of fact to defeat summary judgment even under deferential standard of review for opposing evidence].)

To the extent plaintiff continues to press on appeal the claim that promissory or equitable estoppel are theories of liability for which a material dispute of fact exists, we reject the argument. These theories were not alleged in plaintiffs complaint, which presented a sole cause of action for breach of contract. The County was therefore not obligated to negate either theory in seeking summary judgment. (*Hutton, supra*, 213 Cal.App.4th at p. 493; *Laabs v. City of Victorville, supra*, 163 Cal.App.4th at p. 1258.)

We need not consider the County's remaining arguments in favor of upholding the judgment below.

#### DISPOSITION

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

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BAKER, J.

We concur:

TURNER, P.J.

KRIEGLER, J.