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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SMS FINANCIAL, LA, LLC,

Plaintiff and Respondent,

v.

MICHAEL J. KURGAN,

Defendant and Appellant.

B279657

(Los Angeles County
Super. Ct. No. BC259235)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert Leslie Hess, Judge. Affirmed.

Michael J. Kurgan, in propria persona, Defendant and Appellant.

Law Offices of David W. Brody, David W. Brody and Kenneth R. Shemwell for Plaintiff and Respondent.

In 2001, Union Bank sued International Logistic Systems, LLC (ILS) for breach of contract – specifically, for not paying off its line of credit. Union Bank also sued ILS’s president, Michael J. Kurgan, who had personally guaranteed ILS’s obligation. Judgment was eventually entered against ILS as a result of an order that dispositive requests for admission (RFAs) were deemed admitted against it. Summary judgment was then entered against Kurgan, based on his failure to raise a triable issue of fact that he did not sign the guarantee. Kurgan appeals the judgment against him, raising numerous purported procedural errors. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Line of Credit*

On August 30, 2000, ILS applied for a \$50,000 line of credit with Union Bank. The application was signed by Kurgan – or, at least, someone claiming to be Kurgan. As would become clear over the course of this litigation, Kurgan’s main defense is that Union Bank never satisfactorily established that the application was signed by him, as opposed to some unknown third party who had stolen his identity. In any event, the two-page application contains seven signatures of a “Michael J. Kurgan” on behalf of ILS, and three additional signatures of “Michael J. Kurgan” as the personal guarantor of the line of credit.¹ The application also includes mailing and business addresses for ILS, a home address for Kurgan, multiple telephone numbers for ILS and/or Kurgan, and a social security number for Kurgan.

¹ One of the signatures of “Michael J. Kurgan” as guarantor is dated nearly two weeks after the earlier signatures.

According to Union Bank, it advanced \$49,000 to ILS, which failed to make more than minimal payments on the credit line.

2. *The Complaint and Default Judgment*

On October 5, 2001, Union Bank filed this suit against ILS and Kurgan, stating a cause of action for breach of contract against ILS and a cause of action for breach of guarantee against Kurgan.² Union Bank sought its attorney's fees based on a clause in the line of credit agreement.

The defendants did not answer and Union Bank obtained a default judgment against ILS and Kurgan for \$56,830.95, comprised of principal, interest, late charges, costs and attorney fees. Subsequently, the judgment was assigned to SMS Financial LA, LLC (SMS Financial), which ultimately substituted into the case as the party plaintiff.

3. *Relief from Default and Answer*

In 2012, Kurgan and ILS successfully moved to vacate the judgment and set aside the default. On November 9, 2012, they filed their joint answer, raising 13 affirmative defenses. Kurgan and ILS were, at this time, both represented by the law firm of Hamrick & Evans.

4. *Judgment Against ILS*

On August 26, 2013, as a result of ILS's non-compliance with discovery, the court ordered admitted a series of RFAs served on ILS. Kurgan was not directly affected by this ruling.

² Union Bank also alleged causes of action against both defendants for money lent and money had and received. Those claims rose and fell with the causes of action for breach of contract and breach of guarantee.

One month later, SMS Financial moved for summary adjudication against ILS and Kurgan. We will discuss the motion as it pertained to Kurgan below. As against ILS, the motion was based largely on the admitted RFAs. ILS did not oppose the motion on the merits. Instead, on November 1, 2013, Hamrick & Evans moved to be relieved as counsel for ILS and simultaneously moved to withdraw the firm's appearance on behalf of ILS.³ Hamrick & Evans took the position that its answer on behalf of ILS, filed almost one year previously, had been a mistake, as it had never been retained to represent ILS and was not authorized to do so.

The trial court granted Hamrick & Evans's motion to be relieved as counsel, but denied the motion to withdraw the appearance.⁴ The court then granted summary adjudication of the breach of contract cause of action against ILS. Judgment was entered against ILS in the amount of \$150,873.26, the amount having increased due to interest and attorney's fees.

³ Five months earlier, Kurgan had terminated Hamrick & Evans's representation as his personal counsel and had become self-represented.

⁴ The propriety of this ruling is not before us. We note, however, that the court's rationale was that the law firm's showing that it had not been retained to represent ILS was inadequate. The court specifically noted that the firm failed to submit a declaration from the attorneys who had actually worked on the case, and that the firm had redacted the scope of the representation on the copy of the Kurgan retainer agreement filed with the court.

5. *Summary Adjudication Against Kurgan is Denied*

SMS Financial had also moved for summary adjudication of the breach of guarantee cause of action against Kurgan. By this time, 13 years after the line of credit application, the original documentation had been lost or destroyed. SMS Financial relied on the declaration of a Union Bank officer, Eric Kiemel, who authenticated various copies and computer printouts to establish that Kurgan had signed the application/guarantee, Union Bank had advanced the funds, and ILS had not repaid.

SMS also relied on, among other things, excerpts from Kurgan's deposition, in which he testified he was not certain whether it was his signature that appeared on the application and guarantee. He conceded that his birthdate and social security number were accurately recorded on the application, but he questioned the validity of some of the other identifying information. Surprisingly, Kurgan did admit that ILS had obtained a line of credit from Union Bank; he was simply uncertain if he had been the one to do it. He testified that he left ILS in 2000, having sold it to another company, although he could not recall the name of the buyer and had no documentation evidencing the sale.⁵ Kurgan testified that as part of the sale, he believed the balance on the line of credit was reduced to zero and Union Bank released him from any personal liability on his guarantee. He did not recall personally obtaining the release from Union Bank but believed his attorneys had obtained it.

⁵ The record also contains an exhibit contemporaneously printed from the Nevada Secretary of State website showing ILS's corporate status as "Permanently revoked," but identifying Kurgan as "Active" as the managing member.

Kurgan, who was self-represented at the time, opposed the summary adjudication motion with his own declaration, in which he “object[ed]” to SMS Financial’s documentary evidence, and argued that he “doubt[ed] the credibility or admissibility of the records being submitted.” He specifically stated that the documents did “not bear [his] original signature[] and they do not bear [his] handwriting.”

The trial court denied summary adjudication on the basis that Kurgan’s “declaration raises a triable issue of fact as to whether he signed the documents in this case.”

6. *Bench Trial*

The case proceeded to a bench trial against Kurgan in January 2014 – the trial court concluding that Kurgan waived his right to a jury trial by failing to comply with numerous court orders.

At the trial, SMS Financial offered the testimony of Union Bank Officer Michael Polak who authenticated a copy of the signed loan application.

Kurgan testified in his own defense, claiming that he was now certain the signatures on the application were not his.

The trial court found Kurgan’s testimony to be wholly not credible. The court ruled in favor of SMS Financial, and entered judgment against Kurgan in the amount of \$179,168.10.

7. *The First Appeal*

Kurgan appealed from the judgment and retained new counsel. On August 6, 2015, we reversed, concluding that Kurgan could not be deprived of his right to a jury trial simply based on his obstreperous pretrial tactics. (*SMS Financial LA v. Kurgan* (Aug. 6, 2015, B255617) [nonpub. opn.]) Our disposition

stated, “The judgment is reversed and the matter is remanded for a new trial.” (*Id.* at p. 9.)

8. *Proceedings on Remand*

Upon remand, Kurgan filed a timely peremptory challenge to the trial court judge who had presided over the case to that point. The matter was transferred to another judge.

Kurgan continued to be represented by his appellate counsel. His counsel promised that Kurgan’s “previous mistakes” were unlikely to recur and were being remedied. Supplemental discovery responses were provided. In his supplemental responses to RFAs, Kurgan stated that he lacked sufficient knowledge to admit or deny that the ten “Michael J. Kurgan” signatures on the application are his signatures.

9. *Second Motion for Summary Adjudication (The Operative Motion)*

A. *SMS Financial’s Motion*

Armed with Kurgan’s equivocating supplemental discovery responses and unpersuasive trial testimony, SMS Financial filed a second motion for summary adjudication against Kurgan. The motion again sought adjudication of the breach of guarantee cause of action. Unlike the first motion for summary adjudication, this motion also sought summary adjudication of Kurgan’s 13 affirmative defenses.

SMS Financial relied on a new declaration of Eric Kiemel, who authenticated the relevant documents. Specifically, he authenticated a copy of the signed application, and Union Bank’s computer printouts of the transaction history, showing \$49,000 in advances on the line of credit and minimal payments.

SMS Financial also sought judicial notice of several ILS official documents (e.g., annual lists of managers, articles of

incorporation) which Kurgan had indisputably signed between 1997 and 2000. The documents were submitted to show Kurgan's signature around the time the application had been signed – as further evidence that the 10 signatures on the application were, in fact, Kurgan's.

B. *Kurgan's Opposition*

Kurgan's opposition to the motion for summary adjudication was notable for what it did not do. It included no declaration of Kurgan denying that he signed the application. And while Kurgan suggested that SMS Financial's motion was substantially identical to its first motion for summary adjudication, he made no argument that the motion was procedurally improper for that reason.

Instead, Kurgan's opposition was based on two main lines of attack. First, the copies of the documents on which SMS Financial relied were insufficient under the business records exception to the hearsay rule. (Evid. Code, § 1271.) Second, Kurgan now had a handwriting expert who could testify that the signatures were not his.

As to the admissibility of the documents, Kurgan relied heavily on excerpts from an April 8, 2016 deposition of Kiemel, the Union Bank officer who had authenticated the documents SMS Financial submitted in connection with its summary adjudication motion. For the deposition, Kiemel had been asked to produce any and all loan applications filled out by Kurgan or anyone at ILS, and he brought some copies of the ILS loan application in response. He then testified, at deposition, that he had obtained *some* of those documents in 2013 from a collection agency to whom the loan had been assigned in 2004. Citing to this testimony, Kurgan objected to the copy of the loan

application attached to Kiemel's declaration in support of the summary adjudication motion, by arguing that the document came from a loan servicer and therefore was not produced by Union Bank in the usual course of business. Kurgan made this objection even though the copy which Kiemel had submitted in support of summary adjudication *was not among* the copies he testified had come from the loan servicer.⁶

Kurgan also submitted the declaration of Beth Chrisman, a forensic document examiner. The declaration, which was less than two pages long, said nothing regarding Chrisman's expert qualifications beyond that she was a "court-qualified Forensic Document Examiner." Chrisman stated that she was retained to render an opinion as to the authenticity of the handwriting on the loan application. She stated that she reviewed "the questioned documents" and compared them to "documents containing known handwriting exemplars from Mr. Kurgan dating back to approximately the time" when the application was allegedly signed. She gave her opinion that there was a "strong probability the Michael Kurgan of the known signatures did not sign the questioned signatures." She stated that her opinion was "slightly qualified" because of the "quality of the questioned documents provided." Chrisman did not attach her report to the declaration. She did not identify the known exemplars in her declaration, nor did she specifically identify which copy of the questioned application she had reviewed. Instead, she stated, "My full analysis and report, together with my C.V., will be

⁶ Nor was the copy on which SMS Financial had relied at the bench trial. That copy had been obtained from counsel who had represented Union Bank/SMS Financial from the start of this action. Counsel had attached a copy to the complaint in 2001.

available for use at such time as it is requested by counsel for the defense in the case to which my investigation pertains.”

C. *SMS Financial’s Reply*

In reply, SMS Financial argued that Kurgan produced minimal affirmative evidence, but had instead attacked the admissibility and credibility of SMS Financial’s evidence. As to Kurgan’s main piece of new evidence, the Chrisman declaration, SMS Financial objected to it, arguing that it lacked foundation and was not an admissible expert opinion.

D. *Hearing*

At the June 29, 2016 hearing on the motion, SMS Financial argued that the trial court could itself review the signatures on the application and the known signatures of Kurgan, and conclude that Kurgan had signed the application. SMS Financial argued that once the court reached that conclusion, there was no admissible evidence sufficient to raise a triable issue of fact to the contrary, given that the Chrisman declaration was inadmissible.

The trial court expressed serious concern about the lack of foundation for the Chrisman declaration. When the court asked Kurgan’s counsel why such a superficial declaration should be considered, counsel responded that the court should liberally construe the evidence submitted in opposition to a summary adjudication motion. The court responded, “Liberal construction perhaps means interpretations of the words. I’m not sure liberal construction means omitting things like foundation.” Kurgan’s counsel stated that he could supply the missing information; he offered to hand the court Chrisman’s report and C.V. The court responded that it would not consider evidence not submitted in connection with Kurgan’s opposition.

As the hearing progressed, the court indicated it was inclined to sustain the objection to the Chrisman declaration. Based on that assumption, and the fact that Kurgan had filed no declaration stating that he had not signed the application, the court asked Kurgan's counsel to identify the evidence establishing a triable issue of fact. Counsel relied on the Kiemel deposition to support his argument that "the exemplars of the guarantee proffered by plaintiff in support of the instant motion were not prepared in the ordinary course of business." Kurgan's counsel also argued that SMS Financial's first motion for summary adjudication had been denied on the basis that there were triable issues of fact. When the court asked why that ruling would be applicable here, Kurgan's counsel argued, "Why would the triable issues of material fact disappear, Your Honor?" The court responded, "I don't know. I don't know what evidence was submitted there." SMS Financial's counsel volunteered that Kurgan had submitted a declaration in opposition to the first motion, but not the current one. The court took the matter under submission.

10. *Further Pretrial Proceedings*

The court did not immediately rule on the motion for summary adjudication. In the weeks that followed the hearing, the parties exchanged expert witness designations and otherwise prepared for trial. On June 30, 2016, Kurgan gave SMS Financial Chrisman's C.V. and written report. Kurgan also identified an expert investigator, Robert Price. On July 27, 2016, Kurgan gave SMS Financial Mr. Price's report. Price tracked down one of the telephone numbers on the loan application, and concluded it was not connected with Kurgan or ILS, but rather with someone named Frederick Joseph Rogers. Based on his

investigation, he concluded that it was “likely that Frederick Joseph Rogers had a hand in the loan transaction.” On August 1, 2016, SMS Financial filed a motion in limine to exclude Price’s opinion testimony and evidence. On August 3, 2016, SMS Financial deposed both Chrisman and Price.

11. *The Court Grants Summary Judgment*

On August 18, 2016, the court issued its ruling on the motion for summary adjudication. The court granted the motion on all issues, which resulted in a grant of summary judgment.

The court overruled the vast bulk of Kurgan’s evidentiary objections, including objections to Kiemel’s authentication of the loan application. The court sustained SMS Financial’s objections to Chrisman’s declaration in their entirety.

The court concluded that the judgment against ILS conclusively established that the line of credit was extended to ILS, Union Bank performed, ILS breached, and the damages as of the date of that judgment. The only issues remaining were the existence of the guarantee between Union Bank and Kurgan, Kurgan’s breach and any additional damages since the date of the ILS judgment. The court specifically found Kiemel’s declaration satisfied the authentication requirements for business records for both the loan documents and the transaction history. Further, SMS Financial’s evidence established a demand was made on Kurgan and his nonpayment, as well as the total amount due. As objections were sustained to the Chrisman declaration and Kurgan submitted no declaration of his own, the court concluded there was no admissible evidence raising a triable issue of fact.

12. *Kurgan's Motion for Reconsideration*

Kurgan filed a timely motion for reconsideration. He argued the motion was based on facts “which were not available to Defendant at the time of the hearing” on the motion for summary adjudication. The supposedly new facts on which Kurgan relied were the declaration of Price and the depositions of both Chrisman and Price.

Kurgan also argued, for the first time, that the summary adjudication motion had been improper under Code of Civil Procedure section 437c, subdivision (f)(2), which prohibits a motion for summary judgment on the same grounds as a prior (denied) motion for summary adjudication without relying on new facts or a change in the law. He also argued that, although he had filed no declaration in opposition to the second summary adjudication motion, he had filed a declaration in opposition to the first summary adjudication motion, so it was on file and should have been considered by the court in connection with the second motion.

After SMS Financial opposed the motion, the trial court entered judgment for SMS Financial, impliedly denying reconsideration. (See *Safeco Ins. Co. v. Architectural Facades Unlimited, Inc.* (2006) 134 Cal.App.4th 1477, 1482.) Judgment was entered in the amount of \$139,591.84 in principal, interest and late charges. SMS Financial could seek its attorney's fees as costs. The court subsequently denied the motion for reconsideration by separate order. While the parties were litigating the amount of attorney's fees to be added to the judgment, Kurgan, who was now self-represented again, filed a timely notice of appeal.

DISCUSSION

Having set forth the history of the case, we can now itemize Kurgan's arguments on appeal:

First, the summary judgment denied him his constitutional right to jury trial and violated the rule of law of the case.

Second, SMS Financial's second summary adjudication motion was filed in violation of Code of Civil Procedure section 437c, subdivision (f)(2). Third, the court erred in granting summary judgment for two reasons: it (1) erroneously relied on the ILS judgment in concluding SMS Financial met its burden; and (2) found Kurgan did not raise a triable issue of fact because the court did not consider both his first summary adjudication declaration and Chrisman's expert declaration. Fourth, the court erred in denying reconsideration.

1. *Summary Judgment Did Not Violate Kurgan's Jury Trial Rights or Law of the Case*

Kurgan first argues that summary judgment denied him his constitutional right to jury trial. This argument has repeatedly been rejected. (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1397-1398 (dis. opn. of Johnson, J.) [collecting cases].)

Kurgan next argues that the summary judgment violated the rule of law of the case: he contends our prior opinion ordered that he have a jury trial. We disagree. The doctrine of law of the case is that the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule for any subsequent retrial or appeal in the same case. (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 40.) Here, the only rule of law conclusively decided in the first appeal was that Kurgan

could not be denied a jury trial for failing to comply with court orders; we did not – and could not – decide that Kurgan was entitled to a jury trial under all possible circumstances on remand. Kurgan is correct that the disposition of our prior opinion stated “the matter is remanded for a new trial.” However that statement is fairly intended to hold only that Kurgan could not be deprived of his jury trial rights because of discovery abuses, not that other procedural devices available to either party could not be used to resolve the matter without trial.

2. *SMS Financial’s Second Motion for Summary Adjudication Did Not Violate Code of Civil Procedure section 437c, subdivision (f)(2)*

Code of Civil Procedure section 437c, subdivision (f)(2) provides, in pertinent part, “A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion.”

Assuming, without deciding, that this provision governs successive motions for summary adjudication as well as summary judgment, and further assuming that Kurgan can raise the issue on appeal when he failed to raise it in opposition to the second summary adjudication motion, we conclude the statutory requirement has been satisfied.

We review a trial court’s decision to allow a party to file a subsequent motion for summary judgment for abuse of discretion. (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 72.) The second motion is prohibited when it is not based on any new facts or new law; a second motion which

is merely a “cosmetically repackaged” version of the first motion cannot be filed. (*Bagley v. TRW, Inc.* (1999) 73 Cal.App.4th 1092, 1096-1097.)

In this case, SMS Financial’s second motion for summary adjudication addressed issues not addressed in its first motion – specifically, Kurgan’s 13 affirmative defenses. As such, the court did not abuse its discretion in considering the second motion.

3. *Summary Judgment was Appropriately Granted*

We now turn to the heart of the appeal, whether the trial court was correct in granting summary judgment against Kurgan on his guarantee.

A. *Standard of Review*

“The policy underlying motions for summary judgment and summary adjudication of issues is to ‘promote and protect the administration of justice, and to expedite litigation by the elimination of needless trials.’ ” (*Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323.)

A plaintiff has met his or her burden upon a motion for summary judgment or summary adjudication if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. The burden of proof at trial is relevant to the burden of production borne by the plaintiff moving for summary judgment. “[I]f a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not – otherwise, he would not be entitled to judgment *as a matter of law*, but would have to present his evidence to a trier of fact.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.)

Once the plaintiff has met that burden, the burden shifts to the opposition to show a triable issue of fact exists. In opposing the motion, the defendant may not simply rely upon allegations or denials of the pleadings; the defendant must set forth specific facts showing that a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(1).)

On appeal, we exercise “an independent assessment of the correctness of the trial court’s ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.”⁷ (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) “The appellate court must examine only papers before the trial court when it considered the motion, and not documents filed later. [Citation.] Moreover, we construe the moving party’s affidavits strictly, construe the opponent’s affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it.” (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19; accord, *Lorenzen-Hughes v. MacElhenny, Levy & Co.* (1994) 24 Cal.App.4th 1684, 1686-1687.) The “trial court’s stated reasons for granting summary judgment ‘are not binding on us because we review its ruling, not its

⁷ Although our review is de novo, “review is limited to issues adequately raised and supported in the appellant’s brief. [Citation.]” (*Orange County Water Dist. v. Sabic Innovative Plastics* (2017) 14 Cal.App.5th 343, 368.) For this reason, we decline to address Kurgan’s argument, raised for the first time in his reply brief, that summary judgment was inappropriate because his evidence shows a break in the chain of assignment from Union Bank to SMS Financial.

rationale.’ [Citation.]” (*Johnson v. Open Door Community Health Centers* (2017) 15 Cal.App.5th 153, 157.)

B. *SMS Financial Met Its Burden*

Considering the motion de novo, and not being bound by the trial court’s rationale, we conclude SMS Financial met its burden as moving party.

“A lender is entitled to judgment on a breach of guaranty claim based upon undisputed evidence that (1) there is a valid guaranty, (2) the borrower has defaulted, and (3) the guarantor failed to perform under the guaranty. [Citation.]” (*Gray1 CPB, LLC v. Kolokotronis* (2011) 202 Cal.App.4th 480, 486.)

As to the first issue, the existence of a valid guarantee, Kurgan admitted at deposition that ILS obtained a line of credit from Union Bank. More than that, he admitted that he personally guaranteed it – such an admission is implicit in Kurgan’s testimony that his personal guarantee was released when the company was allegedly sold. The issue then becomes whether SMS Financial established that the line of credit on which it brought suit was the same line of credit Kurgan admitted at deposition. There is a great deal of evidence that it was. First, there is no suggestion in the record that there was a second line of credit issued by Union Bank to ILS. Second, the timing of this line of credit matches up with the timing of the line of credit Kurgan conceded. That is, Kurgan believed his personal guarantee was released when he allegedly sold ILS in 2000. This line of credit was established in 2000. Third, in supplemental discovery responses, Kurgan could neither admit nor deny that he signed the application for this line of credit. Fourth, whoever filled out the application for this line of credit used Kurgan’s birth date and social security number. Fifth, Kiemel

authenticated a copy of the application for this line of credit, which contained 10 signatures of a “Michael J. Kurgan.” We compare those signatures with the official ILS documents reflecting Kurgan’s actual signature around the time the application was signed, and reach the conclusion that the application was signed by Kurgan.⁸ (Evid. Code, § 1417 [genuineness of handwriting may be proved by a comparison made by the trier of fact]; *People v. Rodriguez* (2005) 133 Cal.App.4th 545, 552 [expert testimony is not necessary to authenticate handwriting].)

Kiemel’s declaration also established the other elements of breach of guarantee: that ILS defaulted and Kurgan failed to repay. Kurgan’s supplemental discovery responses demonstrate a lack of evidence to support any of his affirmative defenses. Taken together, the evidence was sufficient to justify judgment for SMS Financial for breach of guarantee.

We have reached this conclusion on a slightly different basis than the trial court. That is, the trial court relied on the earlier *judgment* against ILS to establish every element of the

⁸ In his reply brief on appeal, Kurgan argues at length that the trial court erred in overruling his objections to Kiemel’s authentication of the application document. But he did not raise this argument in his opening brief – he argued only that the court erred in “construing the validity of the loan documents in favor of the Plaintiff” despite Kiemel’s testimony that he obtained some copies of the documents from a collection agency. As the evidentiary argument was not raised in his opening brief, we consider the argument waived. (*Orange County Water Dist. v Sabic Innovative Plastics US, LLC, supra*, 14 Cal.App.5th at p. 368.) In any event, Kurgan’s objection failed to link the objected-to copy (attached to Kiemel’s declaration) to the challenged copies (identified at Kiemel’s deposition).

breach of guarantee cause of action except the identity of Kurgan as the guarantor. Kurgan challenges this reliance as he believes the judgment against ILS was itself void, and therefore insufficient proof of these elements. As we rely on SMS Financial's submitted evidence, rather than the judgment against ILS, we need not address Kurgan's challenges to the validity of the judgment against ILS.

C. *Kurgan Failed to Raise a Triable Issue of Fact*

The heart of this appeal is Kurgan's contention that he raised a triable issue of fact that he did not sign the application. This argument has two parts, neither of which has merit.

Kurgan first suggests that the court erred in failing to consider, in connection with the second motion for summary adjudication, a declaration he had submitted in opposition to the first motion for summary adjudication. He fails to support this argument with any citation to authority. Indeed, there is no authority that a court ruling on a motion for summary adjudication should go beyond the documents submitted in connection with the motion and instead scour the record for any documents which may help the opposing party's cause. The record does not suggest that, in connection with his opposition to the summary adjudication motion, Kurgan asked the trial court to take judicial notice of his earlier declaration or that the declaration should otherwise be considered.

Second, Kurgan argues that the court erred in sustaining SMS Financial's objections to Chrisman's declaration. There is a split of authority regarding the proper standard of review for the trial court's evidentiary rulings in connection with motions for summary judgment –whether the standard is abuse of discretion or de novo. (*Orange County Water Dist. v. Sabic Innovative*

Plastics US, LLC, supra, 14 Cal.App.4th at p. 368.) We need not take sides in the dispute here. Under any standard, Chrisman’s declaration was woefully inadequate and properly excluded. “A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert’s opinion will assist the trier of fact. [Citation.] Even so, the expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. [Citation.] Moreover, an expert’s opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based. [Citations]” (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.)

Here, Chrisman’s declaration failed to properly set forth her qualifications. It stated only that she was a “court-qualified Forensic Document Examiner,” with no indication as to her “knowledge, skill, experience, training or education sufficient to qualify [her] as an expert.” (Evid. Code, § 720.) More importantly, her brief declaration failed to provide a reasoned explanation of why the facts led to her conclusion; it failed to attach the copy of the loan application she reviewed and failed to even identify the sources of Kurgan’s so-called authentic signature to which she had compared the application. Nor did it state in any way the reasons for her opinion. The court’s ruling sustaining the objections to this declaration was necessarily correct.

In connection with Kurgan's first two arguments, he also suggests the trial court erred by not liberally construing his declarations in opposition to the summary adjudication motion. The problem is that, with no declaration of Kurgan submitted and the declaration of Chrisman properly stricken from consideration, Kurgan had no declarations for the court to liberally construe. Kurgan presents no authority that the liberal construction rule applies to the foundation for an expert's opinion. He relies only on authority stating the liberal construction rule itself, not its application to foundation. (*Twohig v. Briner* (1985) 168 Cal.App.3d 1102, 1105.) On the contrary, as this Division has previously explained, "The declarations in support of a motion for summary judgment should be strictly constructed, while the opposing declarations should be liberally construed. [Citation.] This does not mean that courts may relax the rules of evidence in determining the admissibility of an opposing declaration. Only *admissible evidence* is liberally construed in deciding whether there is a triable issue." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761.)

Without Chrisman's declaration, Kurgan's entire summary adjudication opposition boiled down to a largely incomprehensible argument that SMS Financial had failed to meet its burden because it could no longer find the original loan application and all of the copies it had provided in discovery were, for one reason or another, inadequate. But once the court had overruled Kurgan's objections to SMS Financial's evidence, Kurgan offered no evidence to raise a triable issue of fact to challenge it.

4. *Reconsideration was Properly Denied*

Kurgan next argues that the trial court erred in denying his motion for reconsideration. The motion was based on the

purportedly different facts of the Chrisman deposition and the Price report and deposition on “Mr. Rogers’s” involvement in the transaction. But a trial court has no jurisdiction to reconsider a prior order on the basis of new facts “in the absence of a satisfactory explanation for the failure to present them earlier.” (*Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1200.)

Here, by categorizing the Chrisman *deposition* as a new fact, Kurgan confuses facts and evidence. Chrisman’s deposition constituted additional evidence of the facts in Chrisman’s report, which Kurgan possessed when opposing SMS Financial’s motion for summary adjudication, but simply chose not to submit. There were no facts here which Kurgan did not already possess.

Whether the facts contained in Price’s report and deposition were possessed by Kurgan at the time of his opposition to the summary adjudication motion is a more complicated question. Price was an investigator. He used public records and fee-database records to investigate the addresses and telephone numbers for ILS on the application. He worked on the assumption that Kurgan had not signed the application, and ultimately identified Frederick Rogers as someone who might have signed the application in Kurgan’s name.

Kurgan opposed the summary adjudication motion on June 15, 2016. The question, then, is how many of the facts supporting this theory were known to Kurgan by this time. The answer is: quite a lot. Kurgan clearly was aware of the claim that the addresses and phone numbers in the loan application did not relate to ILS from the start of this litigation; he testified to it at his deposition. Moreover, it appears that Kurgan was investigating those addresses and phone numbers all along.

Price's report indicates that the phone number in question first belonged to an entity called Inc-Cubate and later belonged to Avante Global Solutions. But Kurgan knew this as early as the January 2014 bench trial, when he testified that he had recently realized that the signatures on the application were not his – and that he had come to this conclusion because he had learned that the ILS mailing address and telephone number written on the application belonged to Avante Global. Moreover, it had been Kurgan, not Price, who had originally discovered the name "Rogers." Price testified at deposition that Kurgan had done some investigation on his own and gave Price a copy of a LinkedIn website profile for Rogers. Price believed Kurgan "wanted to see if I could redo his stuff or if I would come to the same conclusions that he had, if I could find the same type of information." Although Price was officially retained after the summary judgment opposition, he had first been contacted by Kurgan in May or June, when the summary judgment hearing was on June 29. That Kurgan was pursuing this theory at the time of his summary adjudication opposition is established by the otherwise cryptic sentence in his opposition memorandum, reading, "Additionally, there now appears to exist the possibility that the alleged line of credit which forms the backdrop to the instant litigation may have been fraudulently induced by one or more third parties." Given all of this evidence, Kurgan failed to establish that the facts on which he relied in his motion for reconsideration could not have been presented in opposition to the motion for summary adjudication. The court therefore did not err in denying the motion.

DISPOSITION

The judgment is affirmed. Kurgan is to pay SMS Financial's costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.